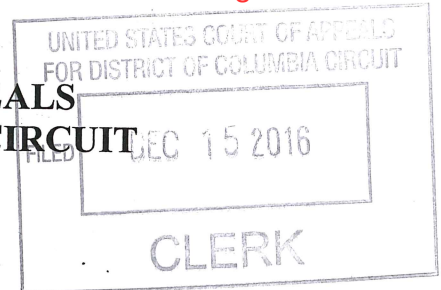


UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUIT

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**



NO. 16-1422

DEC 15 2016

RECEIVED

**UPMC AND ITS SUBSIDIARIES  
UPMC PRESBYTERIAN  
SHADYSIDE AND MAGEE-  
WOMENS HOSPITAL OF UPMC,**

**Petitioners,**

**v.**

**NATIONAL LABOR RELATIONS  
BOARD,**

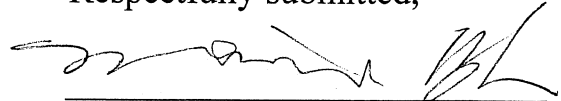
**Respondent.**

ORIGINAL

**PETITION FOR REVIEW**

UPMC and its subsidiaries UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC (collectively "Petitioners"), hereby petition the United States Court of Appeals for the District of Columbia Circuit for review of the Decision and Orders entered by Respondent National Labor Relations Board in Case 6-CA-081896 reported at 362 NLRB No. 191 (2015), *reconsideration den.* (Unreported Decision, Dec. 5, 2016). A copy of the Decision and Orders, is attached as Exhibit A.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Maurice Baskin', is written over a horizontal line.

Maurice Baskin

Terrence H. Murphy

Littler Mendelson P.C.

815 Connecticut Ave., N.W.

Washington, D.C. 20006

[mbaskin@littler.com](mailto:mbaskin@littler.com)

[tmurphy@littler.com](mailto:tmurphy@littler.com)

Phone: 202-772-2526

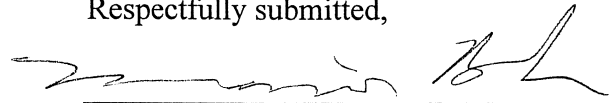
Fax: 202-8420011

*Counsel for Petitioner*

**RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to the Federal Rules of Appellate Procedure 26.1 and Circuit Rule 26.1, the undersigned counsel for Petitioners states that UPMC is the parent corporation of its subsidiaries UPMC Presbyterian Shadyside and Magee-Womens Hospital. UPMC is a non-stock, non-profit corporation and does not itself have any parent corporation. No publicly held corporation owns 10% or more of the stock of any of the Petitioners.

Respectfully submitted,



Maurice Baskin

Terrence H. Murphy

Little Mendelson P.C.

815 Connecticut Ave., N.W.

Washington, D.C. 20006

[mbaskin@littler.com](mailto:mbaskin@littler.com)

[tmurphy@littler.com](mailto:tmurphy@littler.com)

Phone: 202-772-2526

Fax: 202-8420011

*Counsel for Petitioners*

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Petition for Review have been served in the manner indicated below, this 15th day of December 2016:

**BY HAND DELIVERY:**

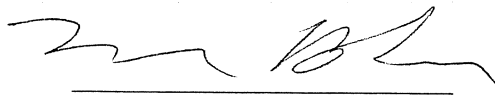
Linda J. Dreeben, Esq.  
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Gary Shinnors  
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National Labor Relations Board  
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**BY REGULAR MAIL:**

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RECEIVED  
December 15, 2016

**VIA HAND DELIVERY**

US Court of Appeals for the DC Circuit  
Clerk - Civil Division  
333 Constitution Ave  
Washington, DC 20001

Re: *UPMC v. NLRB*  
Petition for Review

**16-1422**

Dear Clerk:

Please find enclosed an original and 9 copies of a Petition for Review as well as our firm's check no. 613454 in the amount of \$500 for the filing fee.

Please date-stamp the copies and return to the courier. Should you have any questions, contact me at 202.772.2537.

Sincerely,

Amber R. Christensen  
Paralegal

ARC/arc  
Enclosures

## UNITED STATES OF AMERICA

## BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPMC AND ITS SUBSIDIARIES UPMC PRESBYTERIAN  
SHADYSIDE and MAGEE-WOMENS HOSPITAL OF  
UPMC, SINGLE EMPLOYER, D/B/A SHADYSIDE HOSPITAL  
AND/OR PRESBYTERIAN HOSPITAL AND/OR MONTEFIORE  
HOSPITAL AND/OR MAGEE-WOMENS HOSPITAL

and

Case 06-CA-081896

SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC

ORDER DENYING MOTION FOR RECONSIDERATION  
AND TO REOPEN THE RECORD<sup>1</sup>

The Respondents' motion for reconsideration of the Board's Decision and Order reported at 362 NLRB No. 191 (2015) and to reopen the record is denied. In their motion "seek[ing] reconsideration of every adverse finding in the Board's Decision," the Respondents argue at length why they disagree with the Board's decision, but they have neither identified any material error nor demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations.<sup>2</sup> Nor have the Respondents identified any basis, under that same section, why the record should be reopened.<sup>3</sup>

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<sup>1</sup> The General Counsel and Charging Party each filed an opposition to the Respondents' motion. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>2</sup> The Respondents argue, among other things, that in finding their Solicitation Policy unlawful, the Board incorrectly relied on and applied *Purple Communications, Inc.*, 361 NLRB No. 126 (2014). The Respondents contend that *Purple Communications* was wrongly decided, that it should not have applied retroactively, and that, in any event, the Board should have remanded this case so that the Respondents could have presented further evidence regarding "special circumstances" under *Purple Communications*. However, we have previously addressed

the Respondents' arguments. See *UPMC*, 362 NLRB No. 191, slip op. at 2-5, and see fn. 3, below.

In addition, the Respondents argue that we incorrectly found that their Electronic Mail and Messaging and Acceptable Use of Information Technology Resources policies are unlawful. Here, the Respondents are merely asking us to revisit the factual and legal bases for our findings. Such disagreements do not constitute grounds for reconsideration under Sec. 102.48(d)(1). See, e.g., *Pressroom Cleaners*, 361 NLRB No. 133 (2014).

<sup>3</sup> In relevant part, Sec. 102.48(d)(1) states as follows:

A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

The Respondents assert that the record should be reopened so that they can present a named witness "and others" whose testimony "bears directly on the issue of special circumstances" under the Solicitation Policy. They claim that they did not previously submit the evidence "because *Purple Communications* had not yet been decided." This argument is unavailing. As we explained in the decision in this case, the Respondents were on notice that the issue was before the Board in *Purple Communications*, the Respondents had sufficient incentive to litigate the issue fully, and they did, in fact, litigate the issue. *UPMC*, supra, slip op. at 4. As we further explained, the Respondents submitted a letter after *Purple Communications* issued, and this letter did "not claim that they [had] any new arguments to advance and identifie[d] no additional evidence they might [have] present[ed] if remand were granted." *Id.* Thus, the Respondents have failed to present a sufficient explanation why they did not previously present the evidence. Nor do they argue that the evidence is newly discovered. And finally, the Respondents have failed to explain why the evidence, "if adduced and credited . . . would require a different result." In sum, they have not established a basis for reopening the record. Contrary to the dissent, the Respondents' failure to make the required showings does not result from a lack of opportunity or a lack of incentive to meet their burden. Rather, having attempted repeatedly, but without success, to support their arguments, the Respondents simply seek another bite at the apple.

Member Miscimarra would grant the Respondents' motions. He would grant the motion for reconsideration based on the Board's failure to remand the case to provide an opportunity for the Respondents to litigate whether special circumstances privilege their Solicitation Policy. And he would grant the motion to reopen the record because, in his view, the Respondents were unreasonably denied the opportunity to introduce evidence of special circumstances on remand. Member Miscimarra notes that, in *Purple Communications*, the Board promised that it would give employers the opportunity to demonstrate special circumstances, and that promise was not kept here. See *Purple Communications*, 361 NLRB No. 126, slip op. at 17 ("In the present case, we will remand this issue to the judge to allow the [r]espondent to present evidence of special circumstances justifying the restrictions it imposes on employees' use of its email system. Other employers with email restrictions affected by today's decision will similarly have an opportunity to rebut the presumption."). As former Member Johnson pointed out in his partial dissent from

Dated, Washington, D.C., December 5, 2016.

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Mark Gaston Pearce, Chairman

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Philip A. Miscimarra, Member

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Lauren McFerran, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

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the Board's earlier *UPMC* decision: "This case was litigated under the then-extant *Register Guard* standard. Pre-*Purple Communications*, the Respondent[s] had minimal incentive to litigate and proffer evidence on this issue . . . the Respondent[s] cannot be faulted for failing to fully litigate an issue under a standard that did not exist at the time of the hearing . . ." *UPMC*, 362 NLRB No. 191, slip op. at 11 (Member Johnson, dissenting in part).

Although Member Miscimarra agrees that the Respondents have not otherwise established grounds for reconsideration or reopening the record, he disagrees with the merits of the Board's earlier decision in other respects. Specifically, he adheres to his dissent in *Purple Communications*, and in determining whether the other rules at issue in the case were lawful—the Electronic Mail and Messaging Policy and the Acceptable Use of Information Technology Resources Policy—Member Miscimarra would apply the standard he set forth in *William Beaumont Hospital*, 363 NLRB No. 162 (2016), under which a facially neutral rule should be declared unlawful only if the legitimate justifications for the rule are outweighed by their adverse impact on Sec. 7 activity. *Id.*, slip op. at 9 (Member Miscimarra, concurring in part and dissenting in part).

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**UPMC and its subsidiaries UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC, single employer, d/b/a Shadyside Hospital and/or Presbyterian Hospital and/or Montefiore Hospital and/or Magee-Womens Hospital and SEIU Healthcare Pennsylvania, CTW, CLC. Case 06-CA-081896**

August 27, 2015

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND JOHNSON

On April 19, 2013, Administrative Law Judge David I. Goldman issued the attached decision. Respondents UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief. In addition, the General Counsel filed limited exceptions and a brief in support of the judge's decision, the Charging Party filed limited exceptions and a supporting brief, and the Respondents filed answering briefs to the General Counsel's and Charging Party's limited exceptions.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>1</sup> After the briefing period ended, the Respondents submitted a letter requesting that the Board take notice of *Weyerhaeuser Co.*, 359 NLRB No. 138 (2013), as supplemental authority supporting their position. The Charging Party opposed the Respondents' request and requested that the Board take notice of *Quicken Loans, Inc.*, 359 NLRB No. 141 (2013), as supplemental support for its position. We have accepted these submissions, but we note that *Weyerhaeuser* and *Quicken Loans* were decided by panels that included two persons whose appointments to the Board were not valid. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). However, a properly constituted Board has since reaffirmed the analysis of *Quicken Loans*. See 361 NLRB No. 94 (2014). Further, as we discuss below, the Respondents, Charging Party, and General Counsel submitted additional letters addressing *Purple Communications, Inc.*, 361 NLRB No. 126 (2014). In *Purple Communications*, the Board overruled *Register Guard*, 351 NLRB 1110 (2007), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), "to the extent it holds that employees can have no statutory right to use their employer's email systems for Section 7 purposes." 361 NLRB No. 126, slip op. at 1.

The AFL-CIO filed a motion for leave to file an amicus brief in support of the General Counsel's and Charging Party's positions that the Board should overrule *Register Guard*. The Respondents filed an opposition. We deny as moot the AFL-CIO's motion for leave to file an amicus brief. We also deny as moot the Charging Party's request for oral argument, as it concerned whether *Register Guard* should be overruled.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions<sup>2</sup> only to the extent consistent with this Decision and Order.<sup>3</sup>

The General Counsel alleged that certain language in the Respondents' Solicitation Policy, Electronic Mail and Messaging Policy ("email policy"), and Acceptable Use of Information Technology Resources Policy ("acceptable use policy") was, on its face, unlawful.<sup>4</sup> The judge found that the Respondents violated Section 8(a)(1) of the Act by maintaining the latter two policies because they contained language that reasonably tended to chill employees' exercise of their Section 7 rights. We agree with these findings and with most of the judge's underlying analysis.<sup>5</sup> The judge dismissed the allegation that the

<sup>2</sup> We have amended the judge's Conclusions of law and Remedy consistent with our findings herein. For the reasons stated in the judge's decision, we affirm his denial of UPMC's motion for judgment on the pleadings and his imposition of remedial obligations on UPMC. UPMC correctly observes—and the judge found—that the second amended complaint does not allege that UPMC, as a separate entity, committed unfair labor practices. However, as the judge also explained, pursuant to a stipulation set forth in Joint Exhibit 1, UPMC (along with UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC) agreed to expunge "any policies . . . adjudicated as unlawful" and to notify employees of that action. Accordingly, we agree with the judge that "[t]here is no due process problem . . . with holding UPMC liable for remedial purposes to the extent UPMC consented to be bound by a remedial order . . . ."

<sup>3</sup> We shall modify the judge's recommended Order to conform to the unfair labor practice findings and to the Board's standard remedial language. The Order sets forth remedies for the unfair labor practices and additional remedies based on the stipulation set forth in Jt. Exh. 1. See fn. 2, supra. Finally, we shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

<sup>4</sup> All of the Respondents' personnel and human resources policies are maintained on the UPMC Infont, which the Respondents use to communicate with employees. All employees are given passwords to access the Infont. Computers in certain departments or work areas of Respondents' facilities can be accessed by multiple employees. Not all of Respondents' employees have email addresses within UPMC's electronic mail system.

<sup>5</sup> In finding that the Respondents' email policy was unlawful, the judge relied on, among other cases, *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB No. 54 (2013); *J.W. Marriott Los Angeles at L.A. Live*, 359 NLRB No. 8 (2012); *Karl Knauz BMW*, 358 NLRB No. 164 (2012); *Flex Frac Logistics, LLC*, 358 NLRB No. 127 (2012); and *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012). And, in finding that the Respondents' acceptable use policy was unlawful, the judge relied on, among other cases, *DirectTV*, supra; *J.W. Marriott*, supra; and *Costco Wholesale*, supra. All of those cases were decided by panels that included one or more persons whose appointments to the Board were not valid. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). However, a properly constituted Board has since issued a decision reaffirming the analysis of *DirectTV*. See 362 NLRB No. 48 (2015). In addition, prior to the issuance of the Supreme Court's decision in *Noel Canning*, the United States Court of Appeals for the Fifth Circuit enforced the Board's Order in *Flex Frac Logistics*, see 746 F.3d 205 (5th

Respondents violated Section 8(a)(1) by maintaining the following language in their solicitation policy:

Cir. 2014), and there is no question regarding the validity of the court's judgment. In adopting the judge's unfair labor practice findings regarding the email policy and the acceptable use policy, we rely on these two cases, as well as others cited by the judge that were not invalidated by *Noel Canning*.

In adopting the judge's finding that the Respondents' email policy was overly broad and ambiguous, we find it unnecessary to rely on the judge's reasoning that the policy did not provide "illustrations or guidance" that would assist an employee in interpreting certain terms.

Our colleague's dissent regarding the email policy relies primarily on his disagreement with *Purple Communications*, supra. We will not reiterate the basis for that decision here. The dissent also contends that the judge erroneously conflated ambiguity and discrimination. But the judge did no such thing. Rather, he found the email policy unlawful based on its ambiguity, a finding and analysis that we adopt. He discussed discrimination only in the context of explaining that the (subsequently overruled) *Register Guard* holding—which allowed employers to generally prohibit employee nonwork email use unless they did so discriminatorily—did not immunize overbroad and chilling email restrictions like those at issue here. Inasmuch as *Register Guard* is no longer relevant in that context, we need not rely on the judge's discussion of it with regard to the email policy. Finally, the dissent argues that "[e]mployees would reasonably understand that the [email policy] is designed to reach serious misconduct . . . not their union or other protected activity." But, in view of the wide reach of the Respondents' prohibitions, including several provisions of the acceptable use policy that our colleague agrees are unlawful, we conclude that a reasonable employee would read the restrictions broadly, as they were written. In particular, the email policy's unlawful ban on using the Respondents' systems "to solicit employees to support any group or organization, unless sanctioned by UPMC executive management" would reasonably be understood by employees to cover their union or other protected activity.

Similarly, the dissent concludes that the acceptable use policy's prohibition on the use of UPMC's logos or other copyrighted or trademarked materials communicates to employees that the Respondents are concerned with intellectual property protection and the appearance of misrepresentation, not with the employees' Sec. 7 rights. But the provision does not, by its terms, limit itself to violations of intellectual property law (indeed, the provision would ban employees' protected creation of parodies and many other types of fair use) or the unauthorized representation of oneself as speaking for UPMC. Nor, in our view, does the provision's context convey those meanings. Although our colleague finds relevant context by looking at the preceding provision, an employee would also reasonably look to other nearby provisions that our colleague agrees are unlawful, such as the prohibitions on disparaging or misrepresenting UPMC, making false or misleading statements regarding UPMC, and transferring certain types of information via the internet. See *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015) (finding that employees would reasonably read rule prohibiting use of employer's logos to cover protected employee communications); *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1019–1020 (1991) (finding unlawful prohibition on wearing uniforms with logos while off duty, despite employer's assertion that the rule was "designed to protect the reputations of [employer's] products' trademarks and logos").

The General Counsel and Charging Party contend that *Purple Communications*, supra, provides an additional basis for finding the Respondents' email policy and their acceptable use policy unlawful. Having adopted the judge's findings, for the reasons he states and as clarified above, we find it unnecessary to pass on the effect of *Purple Communications* on those policies.

#### IV. Procedure

....

C. No staff member may distribute any form of literature that is not related to UPMC business or staff duties at any time in any work, patient care, or treatment areas. Additionally, staff members may not use UPMC electronic messaging systems to engage in solicitation (see also Policy HS-IO147 Electronic Mail and Messaging).

....

All situations of unauthorized solicitation or distribution must be immediately reported to a supervisor or department director and the Human Resources Department and may subject the staff member to corrective action up to and including discharge.

Applying *Register Guard*, supra, the judge found the solicitation policy lawful. And because he found the policy lawful, the judge also found that it was not unlawful to require employees to report violations of that policy. No party contends that the policy is unlawful under *Register Guard*. In their exceptions, the General Counsel and Charging Party urged the Board to overrule *Register Guard* and find the Respondents' solicitation policy unlawful under a revised standard based on *Republic Aviation*<sup>6</sup> and related cases. The Respondents, for their part, argued that the judge correctly dismissed the solicitation policy allegation and that the Board should not overrule *Register Guard*. In the alternative, the Respondents argued that even if the Board were to overrule *Register Guard*, the solicitation policy would not be unlawful under a revised standard because special circumstances justify the policy.

While the present case remained pending, the Board overruled *Register Guard* "to the extent it holds that employees can have no statutory right to use their employer's email systems for Section 7 purposes." *Purple Communications*, 361 NLRB No. 126, slip op. at 1. The Board further held that it

will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights.

<sup>6</sup> *Republic Aviation v. NLRB*, 324 U.S. 793 (1945).

Id., slip op. at 14. The Board explained that its holding in *Purple Communications* was to be applied retroactively, and it remanded that case to allow for the introduction of evidence under the new standard. Id., slip op. at 16–17.

After the issuance of *Purple Communications*, the Charging Party, the Respondents, and the General Counsel submitted letters addressing the decision's effect on this case. The Charging Party now argues that the judge's decision should be reversed "to the extent that it upheld the lawfulness" of the Respondents' "Solicitation, Electronic Mail and Messaging, and Acceptable Use of Information Technology Policies based on *Register Guard*." The Charging Party also argues that a further evidentiary hearing is not necessary "since [the judge] held a full evidentiary hearing on the issues relating to the lawfulness of Respondent's email policies in February 2013 and Respondent was given the opportunity to adduce evidence concerning its special circumstances." The General Counsel joins the Charging Party's position, agreeing that the Respondents have already advanced their argument regarding "special circumstances" and that they could have presented testimony on this issue but did not do so.

In their letter, the Respondents state that the Board should reverse its decision in *Purple Communications*. Absent reversal, they contend that the Board should not apply *Purple Communications* retroactively. The Respondents further argue that their policies "are lawful even under the new *Purple Communications* standard" because they "have illustrated that 'special circumstances' justify [their] Policies in the hospital setting," citing their posthearing and answering briefs. Finally, the Respondents assert that if "there is any doubt that Respondents meet the new *Purple Communications* standard," they "must be permitted to present additional evidence relevant to the 'special circumstances' exception."

As described above, the relevant language in the solicitation policy at issue prohibits employees from using "UPMC electronic messaging systems to engage in solicitation." There is no dispute that the policy refers to employees' use of the Respondents' email system, and that employees have rightful access to the Respondents' email system during the course of their work. The Respondents' solicitation policy thus falls squarely within the scope of *Purple Communications*' presumption. Further, this case was pending before the Board when *Purple Communications* issued, and the Board held that it would apply the standard enunciated there to all pending cases in whatever stage. See *Purple Communications*, 361 NLRB No. 126, slip op. at 16–17. We decline the Respondents' invitations to revisit the substance and the retroactive application of that decision. Applying the

standard articulated in *Purple Communications*, we find that the Respondents' employees have a presumptive right to use the Respondents' email system to engage in Section 7-protected communications during nonworking time.<sup>7</sup>

As the Board also held in *Purple Communications*, an employer may rebut this presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights. Id., slip op. at 14. The Board remanded *Purple Communications* for a determination of the lawfulness of the email policy at issue there, particularly with regard to the existence of special circumstances. Id., slip op. at 17–18. The Board did likewise in *DirectTV*, 362 NLRB No. 48, slip op. at 1 (2015).

In the present case, however, the Respondents have already litigated the issue of "special circumstances." In their answering briefs, they argue that even if the Board were to overrule *Register Guard*, the solicitation policy would still be lawful because special circumstances justifying the policy exist in hospital and healthcare environments. In support of their argument, the Respondents cite *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 790 (1979), for the proposition that the Board "[bears] a heavy continuing responsibility to review its policies concerning organizational activities in various parts of

<sup>7</sup> In addition to reiterating his *Purple Communications* dissent, our colleague contends that, here, we wrongly "expand" that decision to the hospital setting. We reject that contention. We are simply applying extant law, and neither the dissent nor the Respondents have persuaded us that hospitals warrant a general exclusion from this law.

Our dissenting colleague also contends that the Respondents' email system is a work area "provided for business and patient care purposes." We addressed the "work area" argument in *Purple Communications*, supra, slip op. at 13, and the addition of "patient care purposes" to the proposed description changes nothing, unless the implication is that the email system should be treated as a patient care area, in which prohibitions on certain Sec. 7 activities are not presumptively unlawful. We reject that characterization, as well. Patient care areas are "places where patients receive treatment." *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 780 (1979) (quoting *St. John's Hospital*, 222 NLRB 1150, 1150 (1976)). Even assuming that the Respondents' email system is used by employees to communicate about patient care, there is no evidence that patients have access to the email system and it is not a place where patients receive treatment. Further, "[t]he rationale for [treating patient care areas differently] is the need to 'maintain[] a peaceful and relaxed atmosphere'" in those places where patients are cared for. *HealthBridge Management, LLC v. NLRB*, Case No. 14–1101, — F. 3d —, 2015 WL 4909945, at \*5 (D.C. Cir. Aug. 18, 2015) (quoting *Baptist Hospital*, 442 U.S. at 783–784 fn. 12, and *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, concurring in judgment)). Limiting employees' protected communications in the email system would no more serve to maintain a peaceful and relaxed atmosphere in patient care areas than would limiting employees' protected communications in break rooms. Cf. id. at \*10 (union flyers posted in break rooms, where patients would not see them, "could not pose any threat of upsetting patients").

hospitals.” The Respondents chiefly rely on studies finding a correlation between employee distraction and patient safety and identify computers and other electronic communication devices as sources of distraction. Based on those studies, the Respondents contend that “it would be irresponsible for the Board to allow employee use of Respondents’ technological resources and email systems.” The Respondents expressly advanced these arguments in response to the General Counsel’s argument that the Board should adopt a *Republic Aviation*-based presumption, which employers could rebut by showing special circumstances. Thus, the Respondents were indisputably on notice that the issue was before the Board for consideration and, because the Board clearly could have adopted and applied the General Counsel’s proposed standard in this case (had *Purple Communications* not issued first), the Respondents had sufficient incentive to litigate the issue fully.<sup>8</sup> Further, the Respondents’ letter—which was submitted after *Purple Communications* issued, and which directly responds to the General Counsel’s and Charging Party’s contentions that no remand is necessary—does not claim that the Respondents have any new arguments to advance and identifies no additional evidence they might present if remand were granted.<sup>9</sup> In short, because the Respondents have already litigated the issue of special circumstances, we find it unnecessary to remand the solicitation policy issue to the administrative law judge for further proceedings.

Turning to the merits of the Respondents’ “special circumstances” defense, we find that they have not rebutted the presumption. In *Purple Communications*, supra, slip op. at 14, the Board stated:

[A]n employer contending that special circumstances justify a particular restriction must demonstrate the connection between the interest it asserts and the restriction. The mere assertion of an interest that could theoretically support a restriction will not suffice. And, ordinarily, an employer’s interests will establish special circumstances only to the extent that those interests are

not similarly affected by employee email use that the employer has authorized.

Here, the Respondents have not established a connection between the interest they assert and the prohibition, not limited to working time, against using “UPMC electronic messaging systems to engage in solicitation,” including solicitation protected by Section 7. We do not doubt that using a hospital’s email system during working time may be distracting, and that when nurses and others responsible for patient care are distracted, errors may result that may affect patient safety. But those concerns, however legitimate, do not justify a policy that prohibits the use of UPMC electronic messaging systems for only one *type* of communication, namely solicitation. Nothing in the studies cited by the Respondents demonstrates that patient-safety interests would not be similarly affected by employee email use that the Respondents have already authorized. Neither do the Respondents explain why the concerns they identify would justify applying this prohibition to nonworking time.<sup>10</sup> It seems to us that the asserted concerns would prompt the Respondents either to deny employees access to UPMC’s email system altogether, which is lawful under *Purple Communications*,<sup>11</sup> or to fashion a policy that applies solely to working time, also permitted under *Purple Communications*.<sup>12</sup> In sum, the Respondents have failed to rebut the presumption that their solicitation policy is unlawful.<sup>13</sup> We therefore reverse the judge’s dismissal of

<sup>10</sup> Nor is the Respondents’ restriction limited to patient-care areas, in which a hospital’s health-care mission might support greater restrictions on employee solicitation than are generally permissible.

<sup>11</sup> See 361 NLRB No. 126, slip op. at 14–15 (“Nor do we require an employer to grant employees access to its email system, where it has chosen not to do so.”).

<sup>12</sup> Id., slip op. at 15 (“The presumption that we apply is expressly limited to nonworking time.”).

<sup>13</sup> “In the healthcare context, establishing ‘special circumstances’ requires evidence that a ban is ‘necessary to avoid disruption of health-care operations or disturbance of patients.’” *HealthBridge Management, LLC v. NLRB*, Case No. 14–1101, —F. 3d. —, 2015 WL 4909945, at \*4 (D.C. Cir. Aug. 18, 2015) (quoting *Beth Israel Hospital*, 437 U.S. at 507). The Respondents, having based their argument on speculative contentions about possible harm, simply have not succeeded in making the required showing. See id., slip op. at 17–20.

In so finding, we do not disregard the importance of hospitals’ patient care obligations. Indeed, they are self-evident. But in this case, as noted, the Respondents’ broad email solicitation ban is not limited to email uses that could affect patient care. And we decline to follow our dissenting colleague’s speculation linking Sec. 7 email communications to patient care consequences. That is, even assuming that employees’ Sec. 7 email communications would constitute a portion of all electronic communications, which constitute a portion of all distractions that medical providers contend with, which cause a fraction of all medical mistakes, we find that Sec. 7 email communications—which, we reiterate, need not be permitted during employees’ working time—would not have a significant effect on patient care. As discussed in *Purple Com-*

<sup>8</sup> Thus, contrary to the dissent’s assertion, we have placed no “novel burden of prescience” on the Respondents.

<sup>9</sup> Because the General Counsel has argued throughout the proceedings in this case that *Register Guard* should be replaced by the rebuttable presumption discussed, this case does not raise the due process concerns that may be seen in cases involving new allegations raised late in the proceedings.

The Respondents and our dissenting colleague point to *Purple Communications*’ statement that other employers with email restrictions affected by that decision would be given an opportunity to rebut the presumption adopted there. Id., slip op. at 17. Under the circumstances of this case, we find that the Respondents have already had that opportunity.

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this allegation and find that the Respondents have violated Section 8(a)(1) by maintaining the solicitation policy.

As a result, we also reverse the judge's finding that the reporting requirement in the solicitation policy is not unlawful. That provision requires employees to immediately report "[a]ll situations of unauthorized solicitation . . . to a supervisor or department director and the Human Resources Department." Because the solicitation policy defines "unauthorized solicitation" to include solicitation protected by Section 7, this rule "reasonably tends to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999); see *Dunes Hotel*, 284 NLRB 871, 878 (1987) (finding unlawful a request or order in an overly broad no-solicitation/no-distribution rule that an employee report on the protected activity of fellow employees).<sup>14</sup>

#### AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 2 and renumber the subsequent paragraphs accordingly.

"2. Since about December 15, 2011, Respondents have violated Section 8(a)(1) of the Act by their maintenance of a solicitation policy that prohibits employees' use of the Respondents' email system to engage in solicitation, including Section 7-protected communications, during nonworking time, and that requires employees to report violations of the solicitation policy."

#### AMENDED REMEDY

In addition to the remedies provided in the judge's decision, we shall order the Respondents to cease and desist from maintaining their solicitation policy on the UPMC Infonet and elsewhere, to rescind that policy, and to notify their employees of the policy's rescission.

*munications*, we disagree with the dissent's view that employers lack effective managerial means of limiting their employees' use of work email during worktime for nonwork purposes. See *supra*, slip op. at 15-16. Further, even if the dissent is correct that *Beth Israel Hospital* requires our consideration in this case of alternatives, such as break rooms and locker rooms, to email access, we view break rooms and locker rooms as inadequate alternatives where, as here, employees work in widely separated locations and varying round-the-clock shifts. Thus, even if we were to balance the competing rights anew rather than relying on the presumption set forth in *Purple Communications*, we would find in favor of the employees' right to use email for Sec. 7 purposes.

<sup>14</sup> The General Counsel does not argue that the language regarding distribution is unlawful. We therefore find it unnecessary to pass on that question.

Should the Respondents promulgate a new or revised solicitation policy that does not unlawfully restrict employees' Sec. 7-protected activities, a provision that requires employees to report violations of the policy would generally be lawful, unless its language or the circumstances of its promulgation or application violate the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

#### ORDER

Respondents UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC, Pittsburgh, Pennsylvania, their officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Maintaining a "Solicitation Policy" that prohibits employees' use of the Respondents' email system to engage in solicitation, including Section 7-protected communications, during nonworking time, and that requires employees to report violations of any such rule.

(b) Promulgating and maintaining an "Electronic Mail and Messaging Policy" that contains the following language:

UPMC electronic messaging systems may not be used:

- To promote illegal activity or used in a way that may be disruptive, offensive to others, or harmful to morale; or
- To solicit employees to support any group or organization, unless sanctioned by UPMC executive management;
- In a manner inconsistent with UPMC policies and directives, including, but not limited to policies concerning commercial communication, solicitation, sexual harassment, job performance and appropriate Internet use.

(c) Promulgating and maintaining an "Acceptable Use of Information Technology Resources Policy" that contains the following language:

UPMC workforce members shall only use UPMC information technology resources for authorized activities. Authorized activities are related to assigned job responsibilities and approved by the appropriate UPMC management. To the extent that a UPMC information technology resource is assigned to an employee, the employee is permitted de minimis personal use of the UPMC information technology resource.

"De minimis personal use" is defined as use of the information technology resource only to the extent that such use does not affect the employee's job performance nor prevents other employees from performing their job duties.

...

20. Without UPMC's prior written consent, a UPMC workforce member shall not independently establish (or otherwise participate in) websites, social networks

(such as face book, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:

- Describe any affiliation with UPMC;

....

- Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;

....

- Use UPMC's logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titles "Use of UPMC Name, Logo, and Tagline").

....

23. Sensitive, confidential, and highly confidential information transferred over the Internet shall use appropriate security controls and have the written approval of UPMC's Chief Information Officer or Privacy Officer.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the "Solicitation Policy" that prohibits employees' use of the Respondents' email system to engage in solicitation, including Section 7-protected communications, during nonworking time.

(b) Rescind the "Electronic Mail and Messaging Policy" that contains the following language:

UPMC electronic messaging systems may not be used:

- To promote illegal activity or used in a way that may be disruptive, offensive to others, or harmful to morale; or
- To solicit employees to support any group or organization, unless sanctioned by UPMC executive management;
- In a manner inconsistent with UPMC policies and directives, including, but not limited to policies concerning commercial communica-

tion, solicitation, sexual harassment, job performance and appropriate Internet use.

(c) Rescind the "Acceptable Use of Information Technology Resources Policy" that contains the following language:

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- Describe any affiliation with UPMC;

....

- Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;

....

- Use UPMC's logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titles "Use of UPMC Name, Logo, and Tagline").

....

23. Sensitive, confidential, and highly confidential information transferred over the Internet shall use appropriate security controls and have the written approval of UPMC's Chief Information Officer or Privacy Officer.

(d) Within 14 days after service by the Region, post at all their facilities the attached notice marked "Appen-

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dix.”<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondents’ authorized representative, shall be posted by Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed any facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by Respondents at any time since December 15, 2011.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondents have taken to comply.

As further remedies for the violations found in this case, UPMC, UPMC Presbyterian Shadyside, and Magee-Womens Hospital of UPMC, Pittsburgh, Pennsylvania, shall, in accordance with the stipulation (Jt. Exh. 1) signed by all parties:

1. Expunge the “Solicitation Policy”, the “Electronic Mail and Messaging Policy”, and the “Acceptable Use of Information Technology Resources Policy” set forth above, wherever those policies exist on a systemwide basis at any and all UPMC, Presbyterian Shadyside, and Magee-Womens Hospital facilities within the United States and its territories.

2. Notify all their employees at all their facilities within the United States and its territories where the “Solicitation Policy,” the “Electronic Mail and Messaging Policy,” and the “Acceptable Use of Information Technology Resources Policy,” as described above, were in existence, that those policies have been rescinded and will no longer be enforced. Appropriate notice to employees of the rescission will be accomplished by whatever means UPMC, Presbyterian Shadyside, and Magee-Womens Hospital have traditionally used to announce similar policy changes to employees in other circumstances.

<sup>15</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Dated, Washington, D.C. August 27, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting in part.

I concur with my colleagues’ conclusion that the Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining certain language in its “Acceptable Use of Information Technology Resources Policy,” but only for the reasons stated below. I disagree with their findings that language in the Respondents’ “Solicitation Policy” and “Electronic Mail and Messaging Policy” are unlawful.

#### I. THE SOLICITATION POLICY

I begin with the Solicitation Policy, which broadly and nondiscriminatorily prohibits solicitation using the Respondent’s electronic messaging systems, including email, which is at issue here. Relying on *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), a decision in which I dissented, my colleagues find that the Respondent’s employees have a statutory right to use the Respondent’s email system for union organizing and other Section-7 related activity because they are already expected to use the business email for work purposes. The majority thus expands *Purple Communications* to the acute care hospital setting, ignores compelling reasons for not doing so, and rejects the Respondent’s argument that it should be permitted to litigate special circumstances justifying its solicitation policy. I dissent because *Purple Communications* was wrongly decided. Alternatively, however, I find that the presumptions established there should not be extended to healthcare settings and that the Respondent established special circumstances related to the taxing hospital environment that justify its prohibition on solicitation using its email system. At the very least, due process, and *Purple Communications* itself, require that the case be remanded for the Respondent to properly litigate the special circumstances that make its policy lawful and necessary for the safety of its patients.

The Respondent’s solicitation policy lawfully bars distribution of “any form of literature that is not related to

UPMC business or staff duties at any time in any work, patient care, or treatment areas,” but continues to state:

Additionally, staff members may not use UPMC electronic messaging systems to engage in solicitation (see also Policy HSI0147 Electronic Mail and Messaging).

....

All situations of unauthorized solicitation or distribution must be immediately reported to a supervisor or department director and the Human Resources Department and may subject the staff member to corrective action up to and including discharge.

Further, section II, describing the scope of the solicitation policy, states in pertinent part:

Covered activities include, but are not limited to: solicitation for raffles, charity drives, sale of goods, proposing or procuring membership in any organization, or canvassing. Activities sponsored and approved by UPMC or a business unit's President are permitted, such as United Way campaigns.

Thus, the policy is nondiscriminatory, applies to all solicitation including for charitable purposes, and the example given for Employer-sponsored solicitation is a charitable organization—presumably referring to Employer-wide charitable efforts.

The judge dismissed the allegation that the challenged language in the solicitation policy was unlawful, applying *Register Guard*, 351 NLRB 1110 (2007) (holding that employees do not have a statutory right to use their employer's email for Sec. 7 communications), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).<sup>1</sup>

During the time that the instant case was pending before the Board, a Board majority decided *Purple Communications*, over my and Member Miscimarra's dissents, overruling *Register Guard* in pertinent part. 361 NLRB No. 126, slip op. at 1. The majority there emphasized that the decision was limited only to email, not “other electronic systems, like instant messaging or texting.” *Id.*, slip. op at 14 fn. 70.

Turning to the instant case, my colleagues apply *Purple Communications* to find that the Respondent violated the Act by promulgating and maintaining language in the solicitation policy that prohibits use of the Respondent's email for solicitation.<sup>2</sup> Under *Purple Communications*,

they find that the employees have a presumptive statutory right to use the Respondent's email for Section-7 related communications during nonworking time, and that the Respondent, which operates acute care hospitals, did not show special circumstances justifying the policy and thus failed to rebut the presumption. (Never mind that at the time of the hearing there was no need to litigate “special circumstances” under any extant law, and certainly not with any vigor.) I disagree with my colleagues' findings for the reasons stated in my dissent in *Purple Communications*, and because the likelihood that health care workers in Respondent's hospitals would be distracted by union or other Section-7 related solicitation emails that arrive in their inbox while they are working creates a heightened risk of error in patient care and a concurrent risk of liability for the hospital.

As I explained in *Purple Communications*, the presumption that employees have a statutory right to use their employer's email for Section 7 activity solely because they use it for business purposes is flawed in multiple respects: It dispenses with any appropriate balancing of the employees' actual need to use the employer's email against the employer's right of control over its own systems. It effectively requires the employer to permit employee use of its email for union and other employment-related matters even during worktime, due to the nature of email which permits little distinction between work and nonworktime, and the improbability of actually monitoring whether usage is limited to nonworking time. Like the majority in the current case, the majority in *Purple Communications* failed to account for the multiple other available modes of communication, including face-to-face discussions and the many other electronic communications networks and personal devices that employees could use for Section-7 related communications on their own time. The failure to consider other modes of communication is particularly problematic in the hospital setting and contravenes Supreme Court precedent.<sup>3</sup> Further, the *Purple Communications* majority acknowledged the availability of other modes of communication, but failed to expressly admit that it was basing its finding that employees had a statutory right to use the employer's email on the *convenience* of such systems, rather than on any showing of necessity on the part of employees. That underlying, if unstated, rationale was wrong there and is wrong here. Finally, *Purple Communications* contravenes employers' First Amend-

<sup>1</sup> Neither the parties nor my colleagues contend that the judge erred in finding that the policy would be lawful under *Register Guard*.

<sup>2</sup> The Respondent's solicitation policy relates to its electronic communications systems, but the aspect my colleagues find unlawful relates

only to use of email and does not extend to instant messaging or other forms of communication, consistent with *Purple Communications*.

<sup>3</sup> *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 505 (1978) (referring to availability of alternative means of communication as a necessary inquiry in assessing hospital restrictions on solicitation).

ment rights by requiring employers, at their own expense, to host and subsidize speech on their own business email systems even where it is hostile to the employer. Thus, because *Purple Communications* was wrongly decided, I find that the instant allegation involving the solicitation policy should be dismissed.

While I adhere to my view that *Purple Communications* was wrongly decided and the employees have no statutory right to use an employer's email for Section-7 related purposes, I alternatively find that, even under *Purple Communications*, the employer has established special circumstances justifying its ban on use of its electronic resources for solicitation. And in that vein, I would not extend the presumption of a Section 7 right to the healthcare setting. The email system is provided for business and patient care purposes and is a virtual *work area* such that requiring its use for Section-7 related communications risks increased distraction and disruption in the already taxing acute care environment, where frequent distractions and interruptions of healthcare professionals are a significant cause of medical error. Given the nature of the hospital setting and the healthcare community's efforts to address the persistent problem of distraction, interruption, and general cognitive overload in the hospital environment, hospitals have legitimate needs to regulate, in a nondiscriminatory manner, the use of their email systems to minimize the extraneous clutter and diversion that contributes to the growing crisis of medical errors. The Respondent has done so here, and the Board should not interfere with those reasonable limitations.

Numerous reports indicate that the distraction and constant interruptions prevalent in the health care environment are a significant cause of medical error and subject of a growing body of research intended to help hospitals develop strategies for minimizing such risks. The Respondent cited several studies identifying electronic communications as a source of distraction of health care workers, and linking distraction and interruption, in turn, to medical error.<sup>4</sup>

<sup>4</sup> One recent study receiving wide media attention found that medical errors contribute to between 210,000 and 440,000 patient deaths annually in United States hospitals, the higher number indicating roughly one-sixth of all deaths that occur in the United States each year. James, *A New, Evidence-based Estimate of Patient Harms Associated with Hospital Care*, *Journal of Patient Safety*, September 2013, Vol. 9, Issue 3, 122–128 (<http://journals.lww.com/journalpatientsafety/icc/2013/09000>) (last accessed August 2015). The reasons are myriad, but distraction, constant interruption, complexity of treatment, and the cognitive overload experience by practitioners are factors. As one recent report addressing the role of distraction in medical errors observed:

High levels of distraction in healthcare settings pose a constant threat to

The Respondent, like all hospitals, has an obligation to its patients and staff to implement strategies for minimizing such distractions where the staff is already at a high risk of error as inherent in the hospital setting. But today's decision threatens to interfere with efforts *throughout* the healthcare community to establish comprehensive strategies for minimizing the risk of extraneous distractions and disruption in the delivery of patient care. Such events as the computer signaling an incoming email have been identified as very real sources of interference in the hospital environment where the intense focus necessary for effective patient care is already besieged by myriad and constant interruption diverting a practitioner, even for a few moments, from the task at hand.<sup>5</sup> Understanding the impact of such distractions is critical here because the nature of email does not permit any effective way to shield an employee, while working, from nonwork-related emails sent by other employees while they are off duty. As explained in my dissent in *Purple Communications* and further below, the notion that working time is for work simply loses its meaning when it comes to email, particularly in the 24/7 hospital environment.<sup>6</sup> In light of the above, and common sense, I disagree with my colleagues' unsupported assertion that these concerns can be dismissed as speculative and that opening the hospitals' email system to virtually unlimited Section 7 activity will not risk interfering with patient care.

patient safety. New technologies have increased the number and types of distractions present in these settings. . . . Anything that diverts attention away from the primary task is a source of distraction. Sources of distraction can be broadly attributed to individuals (e.g., clinicians, patients, family members) or to technology (e.g., medical equipment, computers, communication devices). "Distracted doctoring" is a term recently coined in the media to describe the interruptions to workflow caused by the introduction of new technological devices in the clinical setting. This has been elevated to new levels of concern within the healthcare community and the general public due to the widespread implementation of computerized provider order entry (CPOE) systems and electronic medical records, along with the growing use of cell phones and smartphones.

Feil, *Distractions and Their Impact on Patient Safety 2013*, Pennsylvania Patient Safety Advisory, vol. 10, no. 1, pp. 1–10 at 1 (2013).

<sup>5</sup> Beyea, *Distractions, interruptions, and patient safety*, *AORN journal*, vol. 86, no. 1, pp. 109–112 at 109 (2007) (common distractions and interruptions that occur in clinical environments include computer signaling that new mail has arrived).

<sup>6</sup> As the Respondent convincingly argues on brief, solicitations sent via its email system almost certainly *will* be retrieved and read during working time precisely because Respondents' email system exists for business and patient care, and emails are therefore presumed to be business related. Because the Respondent's employees are expected to read each email, "permitting solicitation through Respondents' email system is tantamount to permitting solicitation on working time."

In extending *Purple Communications* to the hospital setting, my colleagues further err by failing to adequately consider the multiple alternative means of communication available to employees. As the Supreme Court noted in *Beth Israel Hospital*, above at 505:

... in the context of health-care facilities, the importance of the employer's interest in protecting patients from disturbance cannot be gainsaid. While outside of the health-care context, the availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry ... it may be that the importance of the employer's interest here demands use of a more finely calibrated scale. For example, the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same facility.

That case involved organizational solicitation in the hospital cafeteria. The Court upheld the Board's reliance on the minimal usage of the cafeteria by nonemployees and the lack of other suitable areas for solicitation in the hospital to find that the respondent's ban on union-related solicitation *while permitting other solicitation in the cafeteria* violated the Act. Consideration of alternatives is paramount in the hospital setting. That is particularly true here, as we are not talking about solicitation in a cafeteria or gift shop: Here the email system *is* effectively a work area. It is not a cafeteria in place for the employees while on break, but was purchased and developed for business purposes in the service of patient care. And the availability of alternate modes of communication establishes that effective organizing does not depend on access to the Respondent's email. In addition to the employees' personal cell phones and other electronic devices, numerous break rooms are available for face-to-face conversation, with at least 13 break rooms at the Magee facility and 95 locker rooms or staff lounges available at Presbyterian Shadyside.<sup>7</sup>

My colleagues also err by relying on the fiction that this is only about a restriction on nonworktime solicitation and that the Respondent need not permit *worktime* solicitation. Due to the nature of email, the Respondent will, in effect, have to tolerate employees receiving worktime Section-7 related solicitations without regard for the persistence and number of the communications or

the effects on patient care. Unless my colleagues agree that the Employer can prohibit employees from *sending* emails to coworkers during a time *when the recipients* are working, the notion that worktime is for work in the email context is an antiquated nullity. How could it be otherwise? Hospitals operate 24/7. Organizing-type emails sent to a significant number of employees will invariably arrive during employees' worktime. And, as the Respondent points out, employees are required to read their emails because they are presumed to be about business or patient care. It is also unrealistic to believe that employees will refrain from reading and answering such emails until they are on break, especially where an exchange balloons to involve multiple individuals in what may effectively become a group meeting, or when dealing with the emotionally provocative subjects that typically fall under the Act's purview, such as wages or disputes with management.

Further, the right my colleagues extend to hospital employees is unlimited. Union solicitation and other organizing activity involve unit-wide communications, large numbers of employees, and often copious emails. And this Respondent employs 55,000 employees. So a discussion involving just one percent of those employees will include 550 participants, only some of whom will be on break or off duty when the computers signal their arrival and the emails appear in their inboxes, requiring, at minimum, some attention and review, and most likely a response while the email is fresh on the screen of an employee on the computer when the email arrives.<sup>8</sup>

My colleagues contend that the email system is not analogous to a work area. This is mere semantics. The email systems are in place for work purposes and are not analogous to the cafeterias at issue in *Beth Israel Hospital* or locations where patients are unlikely to visit. Further, the salient issue here is not that *patients* might be disturbed by, for example, handbilling in patient care areas, but that healthcare providers may be distracted and interrupted by unrestricted Section 7 emails intruding on their work while they are logged onto hospital computers, performing work on those computers, and obligated

<sup>7</sup> In this respect I disagree with my colleagues that employees cannot adequately communicate with one another in these break rooms and in conjunction with all other personal modes of communication available to them. As I explained in my dissent in *Purple Communications*, my colleagues' argument is based on convenience, nothing more, which is hardly a trigger of a statutory right.

<sup>8</sup> I also find no rational basis for finding that a hospital that permits *some* personal use of the email system in a *nondiscriminatory* manner must as a matter of law allow employees to use the system for union activity as well. There is a vast difference in scale between use of email to, say, find a ride home or some other such minor usage and use of the email for an organizing campaign. As to the former, the hospital may limit the scope of that usage. Not so in the latter case: The newly announced statutory right to use the email system is not limited in scope, whether an employee sends one solicitation email or 500, the latter which will invariably go to employees while they are working even if the sender is on break, and with little recourse for the employer to restrict it.

to read incoming messages.<sup>9</sup> Further, email senders have no way of knowing whether the recipients are working, and the hospital cannot realistically monitor when non-work emails are sent. Work in the often chaotic and stressful hospital environment, and work on computer systems such as obtaining medication and other patient care information, demands a high level of concentration that must be shielded from interruption and distraction as best as practicable. Requiring hospitals to permit union organizing activity or other Section 7 solicitation onto its email systems risks disrupting the health care community's efforts to reduce distraction and resulting medical errors. Thus, in my view, the Agency should not blunder into such a sensitive area by limiting the hospital's ability to control unessential information flow on its own email system: It is not necessary for effective organizing as alternative modes of communication are plentiful, it cannot be effectively monitored without surveilling every email sent or received during worktime, and risks an unwarranted intrusion on efforts to improve patient safety.

Finally, this case must at very least be remanded to allow the Respondent to establish special circumstances justifying its policy, as the majority directed in *Purple Communications*, remanding the issue to the judge "to allow the Respondent to present evidence of special circumstances justifying the restrictions it imposes on employees' use of its email system. Other employers with email restrictions affected by today's decision will similarly have an opportunity to rebut the presumption." *Purple Communications*, slip op. at 17. My colleagues contend that the Respondent litigated special circumstances at the hearing and proffered articles connecting electronic resources to distraction and in turn to medical errors in its brief. I disagree: This case was litigated under the then-extant *Register Guard* standard. Pre-*Purple Communications*, the Respondent had minimal incentive to litigate and proffer evidence on this issue and it is questionable whether extensive evidence on the matter would even have been relevant under the law governing at the time of the hearing. It hardly matters that the General Counsel sought to overrule *Register Guard*: the Respondent cannot be faulted for failing to fully litigate an issue under a standard that did not exist at the time of the hearing, nor for failing to satisfy the novel burden of prescience that my colleagues place on it.

<sup>9</sup> Contrary to my colleagues, *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979); *St. John's Hospital*, 222 NLRB. 1150 (1976), and *HealthBridge Management, LLC v. NLRB*, Case No. 14-1101, — F. 3d. —, 2015 WL 4909945 (D.C. Cir. Aug. 18, 2015) did not limit the special considerations relevant to acute care hospitals. That is tantamount to saying that work disruption and risks to patient care are not required considerations simply because those cases presented different issues.

That being said, I do not take the position that an Employer cannot relinquish some right of control over its email system where it maintains a *discriminatory* prohibition on usage. While I disagree with the decision in *Purple Communications*, I would instead clarify *Register Guard* to hold that if the Respondent (a) *knowingly* allows, (b) on a *regular basis*, its business systems to be used for solicitation related to (c) noncharitable (e.g., non-501(c)(3)) or non-business partner organizations, then consequent discrimination against Section 7 emails is unlawful. By noncharitable, nonbusiness partner organizations, I mean political, social, or civic organizations, or commercial enterprises that the employer itself is *not* doing business with as, for example, a customer or vendor. The mere existence of an email on the system would not show knowing allowance; but an approving response to such an email from a manager or a highly placed statutory supervisor would. The analysis would turn on the facts and circumstances of each case, as would the determination of what a "regular basis" would be, given the facts of the particular employer. Thus, applied here, the Employer's solicitation policy is broadly drawn and has no exceptions except for Employer-sponsored solicitation, presumably indicating an institutional charity drive (the example given being a United Way campaign) where the scope is entirely under the Employer's control consistent with any concerns about emails appearing in employees' in-boxes during working time. Nothing about the Employer's policy unduly burdens or discriminates against Section-7 related activity. Under that approach, and for the other reasons stated above, I find the Employer's solicitation policy a lawful effort to manage the usage of email consistent with its stated concerns about distraction and interruption of patient care.

## II. RESPONDENT'S ELECTRONIC MAIL AND MESSAGING POLICY

I would also dismiss the allegation that the Respondent's electronic messaging policy is unlawful, thus reversing the judge's finding that some of the language of the policy is ambiguous and would chill employees in the exercise of their Section 7 rights. Neither the judge nor my colleagues find the violation under *Purple Communications*, but instead rely on the standard in, e.g., *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to find that certain language in the policy would reasonably be construed to reach activity protected by Section 7 of the Act.<sup>10</sup> Contrary to the majority and to the judge, howev-

<sup>10</sup> In *Lutheran Heritage Village*, the Board affirmed that, where a work rule does not explicitly restrict activity protected by the Act, it may be found unlawful "upon a showing of one of the following: (1)

er, any finding that a policy might chill employees from engaging in Section 7 protected activity flows from an inherent presumption that there is a Section 7 right to be on the Employer's email system in the first place. In my view there is not, and hence there is no protected activity to chill. As for the judge's error, he found that language in the policy stating that Respondent's electronic messaging systems may not be used "[t]o promote illegal activity or used in a way that may be disruptive, offensive to others, or harmful to morale" was unlawful because it swept "broadly and ambiguously." He then stated that, under *Register-Guard*,

... an employer cannot draw a distinction between permitted and prohibited email usage based *solely* on the Section 7 related content of the email. Indeed, in *Register-Guard* the Board found a violation where the employer disciplined an employee for using the email system to send an email where "[t]he only difference between [the employee's] email and the emails permitted by the Respondent is that [the employee's] email was union-related."

Thus, the judge erroneously conflated ambiguity (which depends on there being protected conduct to restrain, even unintentionally) with discrimination along Section 7 lines, which are conceptually quite different. As stated above, I would not find a chilling effect because the employees do not have a right to be on the Respondent's email system, in contrast from my reasons for finding aspects of the acceptable use policy unlawful as described below.

In any event, however, I would dismiss the allegation that the policy would unlawfully chill employees' protected activity even assuming a right to use Respondent's email for Section 7 purposes. First, the prohibition on activity *using the Respondent's own email and electronic messaging systems* that is "disruptive," "offensive" or "harmful to morale" would be reasonably read as of a piece with the prohibition on activity that is illegal. See *University Medical Center v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003) (reversing Board to find rule against "disrespectful conduct" lawful).<sup>11</sup> Employees would

employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. Here we are considering a policy falling under the first prong of this standard—which is predicated on the presumption that the conduct being "chilled" is indeed protected.

<sup>11</sup> The rule there prohibited "[i]nsubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct . . ." The court reversed the Board and found that the prohibition on "other disrespectful conduct" was of a piece with "insubordination," and, in context, employees were unlikely read the rule as barring Sec.7 conduct. Id. 1088–1089. See also *Lutheran Heritage*, above, 343

reasonably understand that the rule is designed to reach serious misconduct that they engage in while using the Respondent's email, not their union or other protected activity. These are, after all, hospital employees. They are fully aware that issues of liability, the hospital's right and duty to maintain a safe, nonhostile work environment, basic civility on the Respondent's business email, and the patient-care setting require such policies for reasons wholly unrelated to what might be their protected activity. Moreover, these rules apply to the Respondent's systems, which employees are expected to be on for business purposes. In this context and in light of the above-described concerns about distraction and interruption of work, where emails are received by employees during their worktime regardless of when they are sent, these hardly draconian policies are reasonable, do not forbid conduct that is an inherent aspect of protected activity,<sup>12</sup> and taken in context would not reasonably dissuade employees from engaging in protected activity.

### III. ACCEPTABLE USE OF INFORMATION TECHNOLOGY RESOURCES POLICY

In contrast to the above, however, the Respondent went too far with language in its "acceptable use of information technology resources policy." I concur with the finding of a violation in regard to this policy, with the exception of the ban on use of logos, but only for the reasons stated below.<sup>13</sup> As the judge noted, the policy

NLRB at 647 (where rule did not refer to Sec. 7 activity, rejecting the conclusion that a reasonable employee would read a rule to apply to protected activity "simply because the rule *could* be interpreted that way." To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Sec. 7 activity, even though that reading is unreasonable).

<sup>12</sup> *Palms Hotel & Casino*, 344 NLRB 1363, 1367–1368 (2005) (lawful rule prohibited conduct that "is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons").

<sup>13</sup> Section 20 of this policy includes the following restrictions:

*Without UPMC's prior written consent, a UPMC workforce member shall not independently establish (or otherwise participate in) websites, social networks (such as face book, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:*

- *Describe any affiliation with UPMC;*
- *Make references to UPMC patients;*
- *Disparage or misrepresent UPMC,*
- *Make false or misleading statements regarding UPMC;*
- *Make promises or commitments by UPMC; or*
- *Use UPMCs logos or other copyrighted or trademarked materials*

*(See UPMC Policy HS-PRJJO titled "Use of UPMC Name, Logo, and Tagline")*

begins with a seemingly broad prohibition on any non-work use applying to all use of Respondent's electronic communications equipment:

The UPMC information technology resources (computers, servers, Internet, email, etc.) shall only be used for supporting the business, clinical, research, and educational activities of UPMC workforce members . . .

However, the Respondent's policy has a rather large loophole. It provides that where a "UPMC technology resource is assigned to an employee, the employee is permitted de minimis personal use of the [resource] . . ." De minimis is defined, contrary to the typical usage, in a sweeping manner:

De minimis personal use" is defined as use of the information technology resource only to the extent that such use does not affect the employee's job performance nor prevents other employees from performing their job duties.

So, in essence, as long as an employee continues to perform his or her job at an acceptable level, and does not distract other employees, UPMC resources may be used as much as the employee wants for personal endeavors. For example, the employee may apparently spend large portions of time at work on the internet on personal email or social media. However, all this comes at a large price, and the price is the Respondent's prior restraint on the employee's participation in internet discourse, wherever UPMC might be mentioned:

*Without UPMC's prior written consent, a UPMC workforce member shall not independently establish (or otherwise participate in) websites, social networks (such as face book, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:*

- *Describe any affiliation with UPMC;*
- *Disparage or misrepresent UPMC,*
- *Make false or misleading statements regarding UPMC*

Insofar as this policy relates to an employee merely accessing the internet using the Respondent's terminal assigned to that employee, the Respondent's servers, and the Respondent's "dumb pipe," I find the language prohibiting employees from describing any affiliation with the Respondent, disparaging or misrepresenting the Re-

spondent, and making false or misleading statements regarding the Respondent to be unlawful.<sup>14</sup>

Under my view, one must determine the overall balance between the Respondent's property rights and its employees' Section 7 rights. Here, the employer is expressly allowing its own electronic resources to be used to contact the wider internet, so the Respondent logically is not asserting a flat-use exclusion, based on its right to exclude employees from personal use.<sup>15</sup> Nor is the Respondent asserting that such use of its property as an access portal to the internet will inherently diminish the value of its network, because it allows a substantial aggregate amount of such use. Moreover, the actual communications that will take place will exist on networks that are not the Respondent's property at all. Thus, Respondent's property interests in this case are qualified and appear relatively modest.

On the other hand, the Section 7 interests in internet communications are weighty. The internet approximates the public square in the world of electronic communications, and this holds true for Section 7 rights as well. As I described it in *Purple Communications*, the online world is an "entire, and constantly expanding, ecosystem of employee expression that allows employees to fully engage in Section 7 communications *without* displacing critical employer business systems." *Id.*, slip op at 61.

Here, Respondent is attempting to control what takes place in this world, with obvious ramifications on what would be Section 7 activity. While an employer policy could prohibit libel or slander in a policy in these cir-

<sup>14</sup> For First Amendment reasons and others, I would not find the policy unlawful if it were restricted only to internal communications, i.e. ones existing solely or primarily on the Respondent's own business communications networks. See *supra* and my dissent in *Purple Communications*. The problem is that the policy affects what employees can say about the employer across the much broader platform of the internet, which is not Respondent's property.

<sup>15</sup> I do not reach the question here of whether an employer, in some circumstances, might be required by the Act to allow its employees use of its electronic resources for the purpose of reaching the broader internet to engage Sec. 7 communications, i.e., "whether adequate avenues of communication exist to effectively communicate about protected concerted activity without the use of [such electronic resources]?" See *Purple Communications*, *id.*, slip op. at 38. Here, the Respondent unquestionably permits employees to use its resources to access the internet. However, it attempts to control the content of such communications by making the access conditional on its approval and indicates strongly that opposition to the Respondent will not be approved. Although I have First Amendment "coerced subsidy" concerns here as well, I would find that they are so *de minimis* as to be akin to the "involuntary easement" that *Republic Aviation*, 324 U.S. 793 (1945), already permits for employees to use their employer's physical property for Sec. 7 communications on nonworktime. Stated otherwise, the Supreme Court has never ruled in *Republic Aviation* or any of its progeny that the employees must pay the employer some kind of rental allowance in order to stand on its physical property and criticize it.

cumstances, the Respondent's prohibitions against statements that "[d]isparage or [m]isrepresent UPMC" and against "false or misleading statements regarding UPMC" are simply too broad under our precedent.<sup>16</sup> As the judge noted, these prohibitions pose a real danger of chilling Section 7 activity, especially because affected employees will have to self-identify and self-report to the Respondent anything that the Respondent might regard as disparaging, misleading, or false.

I agree with the judge as well that the prohibition "on describing any affiliation with UPMC" is reasonably read to prohibit employees from telling anyone where they work, and would be "a restriction that severely inhibits discussion with others about the terms and conditions and pluses and minuses of their work experience." I further agree that, therefore, the "prohibition would greatly chill Section 7-related discussion," although the Respondent may have the legitimate underlying motive of trying to curtail unauthorized representations of its positions and policies on the wide scope of matters that are discussed online.<sup>17</sup>

Thus, the danger to Section 7 rights posed by this entire system of regulation is significant. The Supreme Court has commanded us that the destruction of Section 7 rights "must be as little as consistent with the maintenance of" property rights. *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956). That command, combined with our precedent under *Lutheran Heritage Livonia*, results in me finding the above provisions unlawful. As I have written before, the Board must "concern itself with protecting Section 7 rights on [the] new frontier" of the online world, *Purple Communications*, id. at 61, and this is an ideal case to flesh out this principle. Unfortunately, my colleagues continue with the blunderbuss approach under *Purple Communications*, and so have incorrectly declared much of the employer's policies to be unlawful in this case.<sup>18</sup>

A good example of this is the majority's attack on the Respondent's trademark policy, which, unlike my colleagues, I find lawful. This provision states that employ-

ees, while using the Respondent's information technology resources to access the Web or social media, may not "[u]se UPMC's logos or other copyrighted or trademarked materials."

This provision is not drawn along Section 7 lines, and nor would employees reasonably construe any restriction on their Section 7 rights here, as the provision is clearly meant to protect intellectual property and—more to the point—protect the Respondent from statements made using its electronic resources that could wrongly be attributed to it. First, the Employer has a legitimate interest in its branding and a legally protected property interest in the use of its logos under trademark law wholly unrelated from matters related to labor disputes or union organizing. Under the reasonable construction prong of *Lutheran Heritage Village*, above, employees would reasonably understand that logo and trademark protections are concerned with far broader intellectual property concerns than with restricting Section-7 activity and would not see the Respondent's restriction as an infringement on their Section 7 rights (e.g., workplace photographs or parodies arising from labor disputes). Second, the language must be read in the context of what immediately precedes it in the sentence. Employees, using the Respondent's systems, may not "make promises or commitments by UPMC; or [u]se UPMC's logos or other copyrighted or trademarked material . . ." Read in this context, it would be clear to employees that the Respondent's concern here is misrepresentation, and the possibility that a misrepresentation could give the impression of binding the Respondent or attributing to it some view that it does not hold. Thus the language is largely concerned with the Respondent's liability and prohibits employees from using the Respondent's *own electronic resources* to use its trademarks and logos in a manner that could give the impression that they were speaking on Respondent's behalf. Particularly when employees publish material using the Respondent's electronic resources, which exist for Respondent's business purposes, recipients may have the inaccurate impression that an employee is acting in his or her *official* capacity and that the views expressed may represent those of the Employer's.<sup>19</sup> Thus, I find that employees would reasonably understand the policy to reflect the Respondent's effort to control the use of its trademarked property in communications that could be inaccurately construed as being made on Respondent's behalf, or in some manner having the Respondent's imprimatur.

<sup>16</sup> *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966) (finding of malice required to make out a defamation claim arising from labor disputes).

<sup>17</sup> Here, I fully recognize that Respondent has a legitimate interest in prohibiting non-authorized employees from acting as representatives or spokespeople for UPMC. But the rule in question prohibits identifying *any* affiliation at all, which would include the basic identification of oneself as an employee, an identification that regularly occurs in Section 7 communications.

<sup>18</sup> For the reasons stated by the judge, I agree that the provision related to confidential information—which includes "Compensation Data," "Benefits Data," "Staff Member (Co-Worker) Data," and "Policies and Procedures" is unlawful.

<sup>19</sup> In this respect, the instant case is distinguishable from *Boch Honda*, 362 NLRB No. 83 (2015), relied on by my colleagues (a decision I dissented from on other grounds).

UPMC

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For the above reasons, I respectfully dissent.  
Dated, Washington, D.C. August 27, 2015

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Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a Solicitation Policy that prohibits you from using our email system to engage in solicitation, including communications that are protected under Federal labor law, during nonworking time, and that requires you to report violations of the Solicitation Policy.

WE WILL NOT promulgate or maintain an Electronic Mail and Messaging Policy that contains the following language:

UPMC electronic messaging systems may not be used:

- To promote illegal activity or used in a way that may be disruptive, offensive to others, or harmful to morale; or
- To solicit employees to support any group or organization, unless sanctioned by UPMC executive management;
- In a manner inconsistent with UPMC policies and directives, including, but not limited to policies concerning commercial communication, solicitation, sexual harassment, job performance and appropriate Internet use.

WE WILL NOT promulgate or maintain an Acceptable Use of Information Technology Resources Policy that contains the following language:

UPMC workforce members shall only use UPMC information technology resources for authorized activities. Authorized activities are related to assigned job responsibilities and approved by the appropriate UPMC management. To the extent that a UPMC information technology resource is assigned to an employee, the employee is permitted de minimis personal use of the UPMC information technology resource.

"De minimis personal use" is defined as use of the information technology resource only to the extent that such use does not affect the employee's job performance nor prevents other employees from performing their job duties.

20. Without UPMC's prior written consent, a UPMC workforce member shall not independently establish (or otherwise participate in) websites, social networks (such as face book, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:

- Describe any affiliation with UPMC;

....

- Disparage or Misrepresent UPMC;

- Make false or misleading statements regarding UPMC;

....

- Use UPMC's logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titles "Use of UPMC Name, Logo, and Tagline").

....

23. Sensitive, confidential, and highly confidential information transferred over the Internet shall use appropriate security controls and have the written approval of UPMC's Chief Information Officer or Privacy Officer.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Solicitation Policy, the Electronic Mail and Messaging Policy, and the Acceptable Use of

Information Technology Resources Policy set forth above.

WE WILL, along with UPMC, expunge the Solicitation Policy, the Electronic Mail and Messaging Policy, and the Acceptable Use of Information Technology Resources Policy wherever those policies exist on a systemwide basis at any and all UPMC, Presbyterian Shadyside, and Magee-Womens Hospital facilities within the United States and its territories.

WE WILL, along with UPMC, notify all our employees at all our facilities within the United States and its territories where the Solicitation Policy, the Electronic Mail and Messaging Policy, and the Acceptable Use of Information Technology Resources Policy were in existence that those policies have been rescinded and will no longer be enforced.

UPMC PRESBYTERIAN SHADYSIDE AND  
MAGEE-WOMENS HOSPITAL OF UPMC

The Board's decision can be found at [www.nlr.gov/case/06-CA-081896](http://www.nlr.gov/case/06-CA-081896) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



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*Mark Stuble, Esq. and H. Ellis Fisher, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), of Greenville, South Carolina, and Michael D. Glass, Esq. and Jennifer G. Betts, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), of Pittsburgh, Pennsylvania, and Edward E. McGinley, Jr., Esq. (UPMC Employee Relations), of Pittsburgh, Pennsylvania, for the Respondents.*

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#### DECISION

DAVID I. GOLDMAN, Administrative Law Judge. This case involves the Government's challenge to three policies maintained by an employer for the purpose of regulating employee

use of the employer's electronic technology (e.g., email, computers, servers, etc.). The Government alleges that the three policies violate the National Labor Relations Act (the Act). More specifically, the Government alleges that the policies are overly broad and tend to chill activity protected by Section 7 of the Act. As discussed herein, I find that two of the three challenged policies violate Section 8(a)(1) of the Act. I dismiss the allegations regarding the third policy.

#### STATEMENT OF THE CASE

On May 25, 2012, SEIU Healthcare Pennsylvania, CTW, CLC (the Union) filed an unfair labor practice charge against UPMC and its subsidiary hospitals, docketed by Region 6 of the National Labor Relations Board (the Board) as Case 06-CA-081896. The Union filed an amended charge on June 21, 2012, a second amended charge on July 5, 2012, and a third amended charge on November 19, 2012. On December 13, 2012, based on an investigation of the charge in this case, and others filed by the Union,<sup>1</sup> the Acting General Counsel (the General Counsel) of the Board, by the Regional Director for Region 6 of the Board, issued a complaint alleging violations of the Act by Respondent UPMC, Respondent UPMC Presbyterian Shadyside (Presbyterian Shadyside), and Respondent Magee-Womens Hospital of UPMC (Magee), and an order consolidating this case with other cases. An amended consolidated complaint issued December 13, 2012. UPMC filed a motion for summary judgment January 4, 2013, that was denied by Order of the Board on January 28, 2013.

An order severing the other cases from the instant case issued February 8, 2013, and a second amended complaint issued February 11, 2013.

A hearing in the case was conducted February 20, 2013, in Pittsburgh, Pennsylvania. At the hearing, counsel for the General Counsel moved, without objection, to amend the complaint. That motion was granted. UPMC filed a motion for judgment on the pleadings on February 22, 2013, which is addressed herein. Counsel for the General Counsel, the Union, and the Respondents, filed briefs in support of their positions by March 27, 2013. On the entire record, I make the following findings, conclusions of law, and recommended Order.

#### Jurisdiction

It is alleged in the complaint, admitted by Respondents, and I find, that Respondent Presbyterian Shadyside and Respondent Magee are Pennsylvania nonprofit corporations with offices and places of business in Pittsburgh, Pennsylvania, and have been engaged in the operation of acute care hospitals providing inpatient and outpatient medical care. It is further alleged, admitted, and I find that each of these Respondents, during the 12-month period ending April 30, 2012, in conducting operations derived gross revenues in excess of \$250,000 and purchased and received at their respective facilities in Pittsburgh, Pennsylvania, goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. It is further alleged, admitted, and I find, that Respondent Shadyside Pres-

<sup>1</sup> Cases 06-CA-086542, 06-CA-090063, 06-CA-090133, and 06-CA-090144.

byterian and Respondent Magee are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and health care institutions within the meaning of Section 2(14) of the Act. I further find that Respondent Presbyterian Shadyside and Respondent Magee are employers within the meaning of Section 2(2) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

#### Unfair Labor Practices

##### Background

This case, and the other cases noted above, were originally scheduled for a February 5, 2012 hearing. These cases involved scores of allegations of violations of the Act by Respondents. As February 5, drew near, the parties were actively engaged in settlement negotiations and as a consequence the hearing was postponed. Those negotiations bore fruit, and on February 7, 2013, the Regional Director approved a settlement agreement between Respondents (at that time including UPMC) and the Union. The settlement resolved most of the outstanding allegations. Respondents posted Board-approved notices at nearly 100 locations and agreed to reinstate and pay backpay to employees against whom they had allegedly discriminated. By entering into the settlement agreement, Respondents did not admit to any violations of the Act.<sup>2</sup>

Left unresolved by the settlement was the Government's challenge to certain of Respondents' policies concerning employee usage of Respondents' email and electronic media. The lawfulness of the promulgation and maintenance of these policies is the remaining subject of this case to be resolved.

##### Factual Findings

UPMC is a holding company that owns subsidiaries that operate 20 hospitals in Pennsylvania, with the majority of them located in the Pittsburgh area. UPMC, through its subsidiaries, has over 55,000 employees.

The facilities in the Pittsburgh area that UPMC owns are: Childrens' Hospital, UPMC East, Eye & Ear Institute, Montefiore Hospital, Passavant Hospital, St. Margaret's Hospital, McKeesport Hospital, Mercy Hospital, Western Psychiatric Institute and Clinic, Magee-Womens Hospital, Presbyterian Hospital, and Shadyside Hospital. UPMC, through its various subsidiaries, also operates over 400 clinical locations in Western Pennsylvania, including CancerCenters, Imaging Centers, Outpatient Facilities, Urgent Care Facilities, and Senior Communities.

Respondent Presbyterian Shadyside is a subsidiary of UPMC, and employs more than 9500 employees. Presbyterian Shadyside includes the following facilities: Eye & Ear Institute, Montefiore Hospital, Presbyterian Hospital, Shadyside Hospital, and Western Psychiatric Institute and Clinic. All of these facilities, except Shadyside Hospital, are located in the Oakland area of Pittsburgh, and are interconnected by pedestrian bridges, walkways, and parking garages. Shadyside Hospital is located approximately 1 mile away from the Oakland hospitals.

<sup>2</sup> Copies of the settlement agreement and notice postings were entered into evidence and may be found at Jt. Exhs. 3 and 4.

Respondent Magee is a subsidiary of UPMC, and employs more than 2500 employees. Magee-Womens Hospital is located in the Oakland area of Pittsburgh, several blocks away from Montefiore Hospital.

UPMC has delegated most of its policy-making functions to certain officials of Respondent Presbyterian Shadyside.

Respondent Presbyterian Shadyside, through certain of its officials such as Senior Vice President Gregory Peaslee and Vice President, Privacy and Information Security & Assistant Counsel John Houston, promulgates and maintains personnel and human resources policies which are applicable to all employees of UPMC's subsidiaries, including the facilities referenced above. These policies include the solicitation, electronic mail and messaging, and acceptable use of information technology resources policies at issue in the instant proceeding.

Respondents maintain a "UPMC Infonet" website which is not accessible to the general public and is exclusively for Respondents' communications with employees.

All of Respondents' personnel and human resources policies are maintained on the UPMC Infonet, which is password-protected. All employees are given passwords with which to access the Infonet. There are computers in certain departments or work areas of Respondents' facilities which can be accessed by multiple employees. Not all of Respondents' employees have email addresses within UPMC's electronic mail system.

#### The Three Challenged Policies

This case involves the General Counsel's and the Union's challenge to three policies maintained by Respondents: a solicitation policy, an electronic mail and messaging policy, and an acceptable use of information technology resources policy. The pertinent text of each policy is set forth below.

##### 1. Solicitation Policy

Respondent Presbyterian Shadyside and Respondent Magee maintained a solicitation policy, dated December 15, 2011, until October 9, 2012. It was revised October 10, 2012, in certain respects not relevant to this case, and maintained and published since that time on Respondents' UPMC Infonet. The policies, read, in pertinent part, as follows:

#### IV. Procedure

....

C. No staff member may distribute any form of literature that is not related to UPMC business or staff duties at any time in any work, patient care, or treatment areas. Additionally, staff members may not use UPMC electronic messaging systems to engage in solicitation (see also Policy HS-IS0147 Electronic Mail and Messaging).

....

F.[<sup>3</sup>] All situations of unauthorized solicitation or distribution must be immediately reported to a supervisor or department director and the Human Resources Department and may subject the staff member to corrective action up to and including discharge.

<sup>3</sup> This par. "F" became par. "G" in the October 10 revision.

## 2. Electronic Mail and Messaging Policy

Since about February 1 to about October 25, 2012, and from October 26 to December 6, 2012, and from December 7, 2012, to present, Respondent Presbyterian and Respondent Magee have maintained versions of an electronic mail and messaging policy which read, in pertinent part, as follows:

### IV. Definitions

Electronic Messaging System(s): Any UPMC sponsored e-mail or other electronic messaging system (including instant messaging systems), that is used to conduct UPMC business and has the capability to create, send, receive, forward, reply to, transmit, store, copy, download, or display electronic messages for purposes of communication across computer networks among individuals and groups.

....

### V. GUIDELINES

....

#### 2. UPMC electronic messaging systems may not be used:

- To promote illegal activity or used in a way that may be disruptive, offensive to others, or harmful to morale; or
- To solicit employees to support any group or organization, unless sanctioned by UPMC executive management;
- In a manner inconsistent with UPMC policies and directives, including, but not limited to policies concerning commercial communication, solicitation, sexual harassment, job performance and appropriate Internet use.

#### 3. Acceptable use of Information Technology Resources Policy

Respondents promulgated an "Acceptable Use of Information Technology Resources" policy dated October 10, 2011. It was modified July 27, 2012, and again on December 7, 2012. It has remained in effect since then. All versions of the policy include, in pertinent part:

### I. POLICY

The UPMC information technology resources (computers, servers, Internet, e-mail, etc.) shall only be used for supporting the business, clinical, research, and educational activities of UPMC workforce members.

....

### II. PURPOSE

To establish guidelines for:

1. The acceptable use of UPMC information technology resources.
2. Ensuring that appropriate security controls are implemented on UPMC information technology resources.
3. Ensuring that all software is appropriately licensed and used in a manner consistent with the software's license terms and conditions.

....

### IV. REQUIREMENTS

1. UPMC workforce members shall only use UPMC information technology resources for authorized activities. Authorized activities are related to assigned job responsibilities and approved by the appropriate UPMC management. To the extent that a UPMC information technology resource is assigned to an employee, the employee is permitted de minimis personal use of the UPMC information technology resource.

"De minimis personal use" is defined as use of the information technology resource only to the extent that such use does not affect the employee's job performance nor prevents other employees from performing their job duties.

....

20. Without UPMC's prior written consent, a UPMC workforce member shall not independently establish (or otherwise participate in) websites, social networks (such as Facebook, MySpace, peer-to-peer networks, Twitter, etc.) electronic bulletin boards or other web-based applications or tools that:

- Describe any affiliation with UPMC;
- Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;
- Use UPMC's logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titles "Use of UPMC Name, Logo, and Tagline").

....

23. Sensitive, confidential, and highly confidential information transferred over the Internet shall use appropriate security controls and have the written approval of UPMC's Chief Information Officer or Privacy Officer.

#### Summary of Challenged Policies

To summarize, with an eye toward the General Counsel's and the Union's challenge to these policies:

1. The solicitation policy prohibits employees from using the UPMC email system "to engage in solicitation." It also mandates that all "unauthorized solicitation" be reported to a supervisor or manager and warns that violations may lead to "corrective action up to and including discharge."
2. The electronic mail and messaging policy prohibits employees from using the email system "in a way that may be disruptive, offensive to others, or harmful to morale;" or "[t]o solicit employees to support any group or organization, unless sanctioned by UPMC executive management." In addition, this policy prohibits use of the email system "in a manner inconsistent with UPMC policies and directives, including, but not limited to . . . job performance."
3. Finally, the acceptable use of information technology resources policy restricts use of UPMC "computers, servers, In-

ternet e-mail, etc.” to support “the business, clinical, research, and educational activities of UPMC workforce members.” It restricts use of these resources to “authorized activities” which are defined as “related to assigned job responsibilities and approved by the appropriate UPMC management.” However, the policy provides that where a “UPMC technology resource is assigned to an employee, the employee is permitted de minimis personal use of the [resource],” defined as use of the resource “only to the extent that such use does not affect the employee’s job performance [or prevent] other employees from performing their job duties.”

The acceptable use of information technology resources policy also prohibits employees, “[w]ithout UPMC’s prior written consent,” from “independently establish[ing] (or otherwise participat[ing] in) websites social networks (such as Facebook, MySpace, Peer-to-Peer networks, Twitter, etc.) electronic bulletin boards or other web-based applications or tools that” describe any affiliation with UPMC, disparage or misrepresent UPMC, make false or misleading statements regarding UPMC, or using UPMC logos or other copyrighted or trademarked materials. This policy also requires “written approval of UPMC’s Chief Information Office or Privacy Officer” and the use of “appropriate security controls” for any “[s]ensitive, confidential, and highly confidential information transferred over the Internet.”

#### Analysis

The General Counsel and the Union contend that the promulgation and maintenance of the solicitation, electronic mail, and information technology policies constitute overly broad limitations on the right of employees to communicate regarding activities protected by the Act. As such, it is their contention that these policies on their face—without regard to intent or actual application—violate Section 8(a)(1) of the Act. In deference to the 6-month statute of limitations set forth in Section 10(b) of the Act, the complaint alleges that the violations began and have been occurring at all times since February 1, 2012 (even though the enactment of each policy precedes that date).

The cornerstone of the Act is Section 7, which provides that

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

The United States Supreme Court has long recognized that “the right of employees to self-organize and bargain collectively established by § 7 of the [Act] necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). As the Supreme Court has recognized, the workplace “is a particularly appropriate place for the distribution of § 7 material, because it ‘is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.’” *Eastex, Inc. v. NLRB*, 437 U.S.

556, 574 (1978), quoting *Gale Products*, 142 NLRB 1246 (1963). Accord: *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542–543 (1972) (“[Section 7] organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights.” (Citations omitted.) In short, “the ability of employees to communicate with their fellow employees in the workplace” is “central to Sec. 7.” *J. W. Marriott Los Angeles at L.A. Live*, 359 NLRB No. 8, slip op. at 3 fn. 4 (2012).

Of course, employees’ Section 7 right to communicate in the workplace is not boundless. “[The Board must adjust] the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employer to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee.” *Beth Israel Hospital v. NLRB*, 437 U.S. at 492, quoting, *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945) (Court’s bracketing).

In considering the propriety of employer rules limiting or governing employee communication in the workplace, the Board balances the Section 7 rights of employees and the rights and interests of employers. *Republic Aviation*, supra at 797–798. As the Supreme Court explained in *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976), “the locus of the accommodation [between the legitimate interests of both] may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context.” (Internal quotes and bracketing omitted.)

As part of balancing these interests, the Board has developed presumptions and rules on when employer property rights must give way to employees’ Section 7 rights, and vice versa. Thus, bans on employee Section 7 solicitation at an employer’s facility that apply to nonworking areas during nonworking time are presumptively unlawful. In the other direction, the Board has held that, at least where there is alternative means of communication, an employer’s property interest in its equipment can displace employee Section 7 rights and an employer can ban the use of its equipment—in this case, most pertinently email and electronic resources—for Section 7 purposes, as long as the ban is nondiscriminatory.

The Board’s test for evaluating allegedly overbroad and/or ambiguous rules—the particular issues at bar here—emerged from this balancing of employee and employer rights. The Board recognizes that rules that are overly broad or ambiguous may reasonably be read to ban some employee activity that employers are permitted to ban under the Board’s balancing tests, but also may be read to ban employee activity that is protected under Board tests. If the rule is overly broad and unclear the rule may have a tendency to chill employees in the exercise of protected Section 7 activity while permitting a range of other activity, and this may be so regardless of whether the employer so intends or lawfully can apply the rule in that fashion. Rules

that are ambiguous and overly broad so that they reasonably chill protected activity are violative of the Act.

Thus, “[i]n determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Hyundai American Shipping Agency*, 357 NLRB No. 80 (2011). “Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (footnote omitted), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). “In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004).

If the rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage*, *supra* at 646. If it does not, “the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* at 647.

In the instant case, there is neither evidence nor allegation that the challenged rules were promulgated in response to union activity. There is no claim that the rules have been discriminatorily applied. Rather, in this case the claim is that the challenged rules are overbroad or ambiguous and will reasonably tend to chill employees in the exercise of their rights under Section 7. As the Board has recently explained, when a rule is unduly ambiguous, “[e]ven if the Respondent . . . [does] not intend the rule to extend to protected communications, that intent was not sufficiently communicated to the employees. It is settled that ambiguity in a rule must be construed against the respondent-employer as the promulgator of the rule.” *DirectTV*, 359 NLRB No. 54, slip op. 2 (2013), citing *Lafayette Park Hotel*, *supra* at 828 (even if rule not intended to reach protected conduct, its lawful intent must be “clearly communicated to the employees”). “As the mere maintenance of the rule itself serves to inhibit the employees’ engaging in otherwise protected organizational activity, the finding of a violation is not precluded by the absence of specific evidence that the rule was invoked as any particular date against any particular employee.” *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970), *enfd.* 450 F.2d 942 (5th Cir. 1971).

#### 1. Solicitation policy

Turning to the policies at issue, Respondents’ solicitation policy prohibits the use of email for all nonwork solicitation. There are no other limitations or qualifications.

In determining whether a rule is overly broad or ambiguous, such that it will have a reasonable tendency to chill protected conduct, reference, of course, must be made to the backdrop balancing test that the Board has developed for the type of conduct the rule regulates. And under current Board precedent, this poses a problem for the General Counsel’s argument that the solicitation policy is unlawfully overbroad.

When a workplace rule involves the employees’ right to use a particular item of employer equipment to engage in Section 7

communications, and with regard to use of email and electronic messaging systems in particular, the *Republic Aviation* balancing that governs face-to-face communication has been redrawn—indeed, discarded—in favor of employer property rights and at the expense of employee rights under the Act.

In *Register-Guard*, 351 NLRB 1110 (2007), *enfd.* in part, denied in part 571 F.3d 53 (D.C. Cir. 2009), the Board considered a rule that barred use of the employer’s email system for nonwork-related solicitation. Rejecting the balancing of *Republic Aviation*, the Board majority in *Register-Guard* held that “the Respondent’s employees have no statutory right to use the Respondent’s email system for Section 7 purposes” and that the employer “may lawfully bar employees’ nonwork-related use of its email system, unless the Respondent acts in a manner that discriminates against Section 7 activity.” 351 NLRB at 1110, 1116. In reaching this result, the majority in *Register-Guard* equated the employer’s email system and the issue at stake “with a long line of cases governing employee use of employee-owned equipment,” and found that “[a]n employer has a basic property right” to “regulate and restrict employee use of company property.” *Union Carbide Corp. v. NLRB*, 657, 663–664 (6th Cir. 1983).” *Register-Guard*, *supra* at 1114.

In addition, although the instant case presents a facial challenge to the employer’s rule, and not a claim of discriminatory enforcement of an otherwise valid rule, it is relevant to the discussion to note that the Board majority in *Register-Guard* adopted a new rule for determining when an employer’s discriminatory application of a facially neutral rule violates Section 8(a)(1). The Board majority redrew the line of objectionable discrimination in a way that allowed employers far more leeway to draw lines between permitted and nonpermitted communication, even if the right to Section 7 communication was adversely affected by the line drawing. Thus, the Board in *Register-Guard* found that it was not unlawful for an employer to permit widespread personal use of email by employees but draw a line disciplining employees who engaged in solicitation on behalf of other organizations, including unions.

It must be stressed, however, that while *Register-Guard* provided employers with significant discretion to establish rules for prohibiting employee email usage for nonwork activity, the decision did not provide employers with unlimited discretion to promulgate or enforce rules that discriminate against Section 7 activity in the use of employer-owned email and electronic messaging systems. The *Register-Guard* decision made clear that “drawing a distinction along Section 7 lines” remains unlawful. For instance, an employer cannot permit employees to use its email system to communicate antiunion messages, but prohibit its use by employees for prounion messages. *Register-Guard*, *supra* at 1118. It cannot single out unions, or union organizational activity, or employee discussion of wages and working conditions for narrow prohibition, while allowing comparable discussion or solicitation on every other similar subject. It cannot engage in such viewpoint discrimination. See *Register-Guard*, *supra* at 1119 (violation found where “[t]he only difference between [the employee’s] email and the emails permitted by the Respondent is that [the employee’s] email was union-related”). See *Guard Publishing v. NLRB*, 571 F.3d 53, 60 (D.C. Cir. 2009) (rejecting Board’s dismissal

of an allegation in *Register-Guard*, because “substantial evidence does not support the Board’s determination that [the employee] was disciplined for a reason other than that she sent a union-related e-mail”); see also *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012).

In this case, the Respondents’ solicitation policy bars all nonwork solicitation. Other nonwork use of the email system is not barred, but the line is drawn based on solicitation/nonsolicitation generally, not on Section 7 lines. Under *Register-Guard*, the solicitation policy is lawful. It bars no Section 7 activity that the Board has found takes precedence over an employer’s assertion of a property right to bar generally nonwork solicitation.<sup>4</sup>

The Union also contends (CP Br. at 15) that the solicitation policy’s requirement that “unauthorized solicitation or distribution must be immediately reported to a supervisor [or manager]” constitutes an unlawful interference with protected activities, citing cases such as *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998), and cases cited therein. However, those cases are distinguishable. They find unlawful employer invitations

to report instances of fellow employees’ bothering, pressuring, abusing, or harassing them with union solicitations and imply and imply that such conduct will be punished. [The Board] has reasoned that such announcements from the employer are calculated to chill even legitimate union solicitations, which do not lose their protection simply because a solicited employee rejects them and feels “bothered” or “harassed” or “abused” when fellow workers seek to persuade him or her about the benefits of unionization.

*Greenfield Die & Mfg.*, 327 NLRB at 238.

In this case, reasonably read, the solicitation policy’s reporting requirement is tailored to a requirement that substantive violations of the solicitation policy be reported. As discussed above, this is a lawful policy under *Register-Guard*, *supra*. Given that, it is not unlawful to require employees to report violations.

I will dismiss the allegations of the complaint alleging that the solicitation policy is unlawful.

## 2. Electronic mail and messaging policy

The electronic mail and messaging policy is a very different policy than the solicitation policy. It does not prohibit the nonwork use of or solicitation through the email system, opening the way for employees to use the email system for a range of nonwork activity. Its limitations on nonwork use bear scrutiny.

First, the distinction between the type of nonwork use permitted and prohibited is stated in broad and ambiguous terms,

<sup>4</sup> The General Counsel and the Union argue that *Register-Guard* should be overruled. This argument must await consideration by the Board. My charge is to apply Board precedent. *Waco Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (“We emphasize that it is a judge’s duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied.”) (Citation omitted); *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004).

indicating only that the policy bars nonwork use that “may be disruptive,” or “offensive” or “harmful to morale.” Second, under this policy, solicitation is barred only if it seeks to have employees “support any group or organization,” and even that is permitted if it is “sanctioned by UPMC executive management.”

Thus, this policy does not bar all employee nonwork use of email, but only some nonwork use of email. Considering the first limitation, nonwork email usage is allowed unless the usage “may be disruptive,” or is “offensive,” or “harmful to morale.”

These terms—and there are no illustrations or guidance provided that would assist an employee in interpreting them—sweep broadly and ambiguously. It is clear that these terms would reasonably be understood to include a spectrum of communication about unions, and, indeed, criticism of Respondents’ working conditions, while permitting widespread nonwork use of the email system for an array other subjects.<sup>5</sup>

The result is that this ambiguous rule, while permitting a range of nonwork use of email, would reasonably chill employee use of the email system to discuss *any* Section 7 activity, which, of course, includes not only discussion of organizing a union but any concerted discussion of employment conditions.

This is a violation of the Act under longstanding Board precedent. And nothing in *Register-Guard* overturns, reorders, or renders irrelevant the Board’s longstanding approach to overly broad and ambiguous employer rules. To be sure, *Register-Guard* moved the marker guiding distinctions an employer can draw between prohibited and permitted communications. But an employer’s discretion to draw lines that permit some nonwork use but prohibit Section 7-related use of the email system is not unlimited. Where an employer’s rule permits nonwork use of email, a vague and overly broad rule about the email usage presents the same problem for employees that the Board confronts in every case where the rule sweeps broadly and ambiguously through Section 7 rights.

That is, the employer has “failed to define the area of permissible conduct in a manner clear to employees and thus caused employees to refrain from engaging in protected activities.” *American Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132, 137 (8th Cir. 1979). Employees confronting an employer’s rule “should not have to decide at their own peril what information

<sup>5</sup> *Karl Knauz Motors*, 358 NLRB No. 164 (2012) (“Courtesy” rule unlawful because its broad prohibition against being “disrespectful” using “language which injures the image or reputation” of the employer, would reasonably be construed by employees as encompassing Sec. 7 activity such as statements to coworkers objecting to working conditions and seeking support of others in improving them); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (“We find that the rule’s prohibition of ‘negative conversations’ about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities. Accordingly, the rule is unlawful under the principles set forth in *Lutheran Heritage Village-Livonia*”); *University Medical Center*, 335 NLRB 1318, 1320–1322 (2001) (rule against “disrespectful conduct” toward others unlawful), *enf. denied* in relevant part 335 F.3d 1079 (D.C. Cir. 2003).

is not lawfully subject to such a prohibition.” *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 12 (2011), cited in *DirectTV*, 359 NLRB No. 54, slip op. at 3 (2013). Such ambiguity and over breadth is unlawful precisely because it chills Section 7 activity—an employee will reasonably avoid Section 7 activity precisely out of concern that the employer may apply the rule in a manner that impermissibly singles out Section 7 activity. This is the very essence of the problem that the Board precedent is designed to prevent. That is why

Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer. This principle follows from the Act’s goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer—instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it.

*Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 2 (2012).

It is no answer for an employer to retort: “employees have no statutory right under *Register-Guard* to use the email system for Section 7 purposes, so they should *presume* that a vague rule prevents all use of the email system for Section 7 purposes, and does so in lawful way.” Under *Register-Guard*, an employer cannot draw a distinction between permitted and prohibited email usage based *solely* on the Section 7 related content of the email. Indeed, in *Register-Guard* the Board found a violation where the employer disciplined an employee for using the email system to send an email where “[t]he only difference between [the employee’s] email and the emails permitted by the Respondent is that [the employee’s] email was union-related.” *Register-Guard*, supra at 1119.

Thus, nothing in *Register-Guard* permits facially overbroad and vague email rules. Indeed, the Board has explained its understanding of *Register-Guard* in just this way.

In *Costco Wholesale Corp.*, 358 NRB No. 106 (2012), the Board considered a handbook rule maintained for employees entitled “Electronic Communications and Technology Policy.” The rule governed “electronic communications for business use” and warned that “[m]isuse or excessive personal use of *Costco* technology or electronic communications is a violation of company policy for which you may be disciplined, up to and including termination of employment.” The policy required, *inter alia*, that

Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the *Costco* Employee Agreement. Employees should be aware that statements posted electronically (such as online message boards or discussion groups) that damage the Company, defame any individual or damage any person’s reputation, or violate the policies outlined in the *Costco* Employee Agreement, may be subject to discipline, up to and including termination of employment.

The Board found this workplace rule unlawful. In doing so the Board went out of its way to specifically address *Register-*

*Guard*, and distinguish it. The Board in *Costco* explained that the

rule does not implicate Board’s holding in *Register-Guard*, 351 NLRB 1110 (2007), *enfd.* in relevant part 571 F.3d 53 (D.C. Cir. 2009). The issue in *Register-Guard* was whether employees had a statutory right to use their employer’s email system for Sec. 7 purposes. The Board found that the employer did not violate Sec. 8(a)(1) by prohibiting the use of the employer’s email for “nonjobrelated solicitations.” Here, the rule at issue does not prohibit using the electronic communications system for all non-job purposes, but rather is reasonably understood to prohibit the expression of certain protected viewpoints. In doing so, the rule serves to inhibit certain kinds of Sec. 7 activity while permitting others and, for this reason, violates Sec. 8(a)(1).

358 NLRB at slip op. at 2 fn. 6 (parallel citations omitted).

The Board’s reasoning in *Costco* is on point here. Precisely as in *Costco*, here Respondents’ electronic mail and messaging policy does not prohibit using the electronic communications system for all nonjob purposes, but rather, bars only vaguely characterized types of communications (e.g., communications that may be “disruptive,” “offensive” or “harmful to morale”). Precisely as in *Costco*, the rule at issue “is reasonably understood to prohibit the expression of certain protected viewpoints. In doing so, the rule serves to inhibit certain kinds of Sec. 7 activity while permitting others and, for this reason, violates Sec. 8(a)(1).”<sup>6</sup>

<sup>6</sup> Notably, Respondents’ contention that the rule at issue in *Costco* did not involve use of the employer’s electronic resources is in error. See 358 NLRB No. 106, slip op. at 7–8.

Respondents also contend (R. Br. at 32) that the Board’s recent decision in *DirectTV*, 359 NLRB No. 54 (2013) undermines—or is inconsistent with—the Board’s decision in *Costco*. Respondents’ contention is based on a misreading of *DirectTV*. In *DirectTV*, an administrative law judge ruled (slip op. at 21):

Regarding handbook provision 21.4 Use of Company Systems, Equipment and Resources, the General Counsel maintains that even though the Respondent prohibits “use of company property,” namely company systems, equipment and resources, which includes the Respondent’s email system, for purposes “of any religious, political, or outside organizational activity,” this blanket prohibition should be found impermissible regarding Section 7 activity as it unduly restricts union and protected concerted activities. The General Counsel, citing *Register-Guard*, 351 NLRB 1110 (2007), acknowledges that the Board has recently resolved the issue. I agree. I shall dismiss this allegation of the complaint.

The Board agreed with the Judge that the policy was lawful under *Register-Guard*. (Slip op. at 1 fn. 2.)

Respondents argue that this decision is at odds with the decision in *Costco*, because the full policy, as set forth in the ALJ’s decision, like the policy in *Costco*, involved arguably ambiguous limitations on personal usage such as “questionable subject matter.” However, it is apparent from the ALJ’s reasoning (reproduced in full here), and the Board’s endorsement of it, that the ALJ did not consider the lawfulness of that aspect of the policy. It is not mentioned in his analysis. Rather, the ALJ’s ruling considered only whether a rule permitting the use of the email system by employees could exclude use for purposes “of any religious, political, or outside organizational activity.” Under *Register-Guard*, such a rule is lawful. But, as discussed in the text, *Costco* con-

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Independently, the electronic mail and messaging policy's ban on solicitation that seeks to have employees "support any group or organization, unless sanctioned by UPMC executive management," is also violative of the Act.

It would be one thing, pursuant to *Register-Guard*, to promulgate a rule barring use of an employer's email system for nonwork matters, including Section 7 solicitation (i.e., Respondents' solicitation policy, discussed above). And it would be one thing, pursuant to *Register-Guard*, to bar solicitation in support of any group or organization. However, a rule barring solicitation for groups or organizations "unless sanctioned by UPMC executive management" holds out the prospect that there are groups and organizations on whose behalf employees will be permitted to solicit—as long as UPMC executive management approves.

A rule providing for a management approval process for certain viewpoints and certain organizations is antithetical to Section 7 activity and a reasonable employee will be chilled from even asking. As with any overly broad and ambiguous rule, the employer has effectively chilled Section 7 activity without expressly prohibiting it. "In doing so, the rule serves to inhibit certain kinds of Sec. 7 activity while permitting others and, for this reason, violates Sec. 8(a)(1)." *Costco*, supra. "The Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer" requires the Board, "instead of waiting until that chill is manifest," to "undertake the difficult task of dispelling it." Such rules chill Section 7 activity precisely because the employees must seek permission to engage in such solicitation.

In this regard Respondents' rule here is squarely analogous to the no-access rule found unlawful in *J. W. Marriott Los Angeles*, 359 NLRB No. 8 (2012). In *J. W. Marriott*, the Board found unlawful an employer rule that barred access by offduty employees to the interior of the employer's facility except with "prior approval from your manager." In doing so, the Board rejected the argument that "no Sec. 7 right is at issue because 'there is no Section 7 right of off duty employees to access the interior of an employer's facility'" (359 NLRB No. 8, slip op. 3 fn. 4) (internal quotations omitted), an argument equally applicable here, as there is no statutory right to use the employer's email system for Sec. 7 purposes. *Register-Guard*, supra. The Board in *J. W. Marriott*, supra, slip op. at 2, held that notwithstanding that there is no Section 7 right for offduty employees to access the interior of the facility, the rule at issue was unlawful because it

requires employees to secure managerial approval, giving managers absolute discretion to grant or deny access for any reason, including to discriminate against or discourage Section 7 activity. The judge therefore found that the rule "invites reasonable employees to believe that Section 7 activity is prohibited without prior management permission." Indeed, because all access is prohibited without permission, it does more than merely invite that belief: it compels it. In turn, em-

ployees would reasonably conclude that they were required to disclose to management the nature of the activity for which they sought access—a compelled disclosure that would certainly tend to chill the exercise of Section 7 rights.

*J. W. Marriott* relies on the Board's decision in *Tri-County Medical Center*, 222 NLRB 1089 (1976), in which the Board established that an employer's rule barring offduty employees from access to its facility is valid only if it:

(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.

*Tri-County* enables an employer to ban completely offduty employee access to the interior of its property. Similarly, *Register-Guard* enables an employer to ban completely employee nonwork of its email system. However, neither *Tri-County* nor *Register-Guard* allows an employer to promulgate rules prohibiting access or use "just to those engaging in union activity." *Tri-County*, supra; *Register-Guard*, supra (violation to discipline employee for using email where "only difference between [the employee's] email and the emails permitted by the Respondent is that [the employee's] email was union-related"). And in neither situation may an employer maintain a rule that permits use of its property, including for Section 7 purposes, only when employees obtain approval from management.

In the instant case, as with access for offduty employees in *J. W. Marriott*, a complete ban on employee email use would not raise a legal issue. However, just as with the access rule in *J. W. Marriott*, employees wanting to use email for Section 7 purposes are required to disclose this to and seek permission from management. This chilling effect is unavoidable. Of course, the problem is made even more acute by the fact that employers have a right under 8(c) of the Act to communicate their views (noncoercively) regarding unionization. Many employers do not hide their views on unionization and their view, whatever it is, could serve to chill employee willingness to seek permission to solicit for the opposite view.<sup>7</sup>

<sup>7</sup> At the hearing the Union indicated it was going to present a witness for the purpose of authenticating and moving into evidence a large number of documents purportedly maintained by Respondents on a website available to employees, and which provided information that, I think it is fair to say, was devoted to giving employees reasons not to support the Union. We did not reach the point of authenticating the documents with a witness, as I sustained Respondents' objections to introduction of these documents on relevancy grounds (that being the occasion for my review of the documents). The documents were placed in the Rejected Exhibit File, as CP Exhs. 1 and 2. On brief, the Union has raised again the issue of the admissibility of the documents. Upon consideration of the matter, I do agree that the documents are relevant in one respect (and it is one of the rationales for admission specifically advanced by the Union at the hearing). Evidence that Respondents conveyed to employees that they opposed unionization is relevant to consideration of whether a reasonable employee would be willing, pursuant to the terms of the electronic mail and messaging policy, to seek Respondent's permission to solicit for prounion causes. The establishment by the employer (presumably in a completely lawful man-

sidered a different question: the application of an overly broad and ambiguous limitations on otherwise permitted personal use of computer systems.

I find the electronic mail and messaging policy is overly broad and ambiguous, in violation of Section 8(a)(1) of the Act.

### 3. Acceptable use of information technology resources policy

The acceptable use of information technology resources policy begins by establishing a broad restriction on the use of Respondents' information technology for "business, clinical, research, and educational activities of UPMC workforce members." This policy goes on to delineate a significant carve-out to the broad prohibition: where a "UPMC technology resource is assigned to an employee, the employee is permitted de minimis personal use of the [resource]." The policy expressly defines "de minimis personal use" as use of the resource "to the extent that such use does not affect the employee's job performance [ ] or prevent[ ] other employees from performing their job duties."

The other part of the acceptable use policy challenged in the complaint consists of the following "requirements" (excerpted from a list of 25):

20. Without UPMC's prior written consent, a UPMC workforce member shall not independently establish (or otherwise participate in) websites, social networks (such as face book, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:

- Describe any affiliation with UPMC;
- ....
- Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;
- ....
- Use UPMC's logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titles "Use of UPMC Name, Logo, and Tagline").
- ....

23. Sensitive, confidential, and highly confidential information transferred over the Internet shall use appropriate security controls and have the written approval of UPMC's Chief Information Officer or Privacy Officer.

In terms of analyzing these provisions, Respondents argue (R. Br. at 34) that read in context, this "policy is exclusively

ner) that it actively discourages and opposes unionization would discourage employees from seeking permission to communicate for prounion causes. I reverse my relevancy ruling on these grounds. However, I am not admitting the documents because, due to my initial ruling, authentication was not established. In addition, I do not believe introduction of these documents are necessary to my findings and conclusions. As stated in the text, the right of the employer to advance its position on Sec. 7 matters would likely chill employees seeking permission to engage in contrary Sec. 7 solicitation. But should a reviewing body agree with my relevance ruling and disagree with my view that these documents are not decisive, the proper course will be a remand order for the purpose of permitting the Union an opportunity to authenticate the documents (through witness testimony or stipulation).

intended to govern communications that could reasonably be construed as being made on behalf of Respondents." They further argue that the policy "only restricts employees' use of Respondents' equipment and activities at work. The policy does not (and could not reasonably be construed to) restrict employees' ability to use their own electronic resources while offduty to engage in Section 7 activity." Id.

As to Respondents' latter contention, I agree. The introductory "policy" and "purpose" provisions render reasonably clear that this policy concerns use of UPMC information technology resources—not employees' own computers and technology. (See, "Purpose" . . . . To establish guidelines for . . . the acceptable use of UPMX information technology resources.") However, Respondents' former claim—that the policy may reasonably be read to govern only communications that could be "construed as being made on behalf of Respondents"—does not constitute a reasonable reading of the policy. That is certainly one concern of the policy. But the portion of the policy that the General Counsel's case takes issue with is the portion governing "de minimis personal use" by employees. Almost by definition, that is use of the computer systems that is not being made by employees on behalf of Respondents.

Read in context—employees are allowed to use computers for nonwork purposes to the extent it does not interfere with job duties and, based on item 20, it appears that employees may use these resources for social media communication that goes well beyond communication with others using Respondents' equipment. By implication employees are permitted to use Respondents' equipment to participate in Facebook, MySpace, Twitter, and other such sites, as long as the employees do not describe any affiliation with UPMC, do not "disparage or misrepresent" UPMC, make "false or misleading statements regarding UPMC," or use UPMC logos, "or other copyrighted or trademarked materials." However, employees can make statements and communications that fall within the scope of these restricted areas if written prior consent is obtained from UPMC.

Based on much the same reasoning set forth above regarding the electronic mail and messaging policy, these overly broad and vague restrictions on employee use of technology resources, which employees can avoid if they seek and receive permission from the employer, violate the Act. Thus, the prohibition on statements that "[d]isparage or [m]isrepresent UPMC" and the prohibition on "false or misleading statements regarding UPMC" are very similar to the prohibition on posted statements "that damage the Company, defame any individual or damage any person's reputation" that were found unlawfully overbroad in *Costco*, supra.<sup>8</sup> Nothing in Respondents' rule

<sup>8</sup> See also *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (rule against "derogatory attacks on hospital representatives" unlawful), *enfd.* in relevant part 916 F.2d 932, 940 (4th Cir. 1990) ("By permitting the punishment of employees for speaking badly about hospital personnel, the employer 'failed to define the area of permissible conduct in a manner clear to employees and thus cause[d] employees to refrain from engaging in protected activities'" (quoting *American Cast Iron Pipe v. NLRB*, 600 F.3d 132, 137 (8th Cir. 1979)); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) ("rule's prohibition of 'negative conversations' about managers would reasonably be construed by employees to bar them from discussing with their coworkers

indicates that any protected activity is exempt from the rule, and thus, facially, the rule chills Section 7 activity in the absence of a lawfully promulgated rule that draws lines in a non-discriminatory way explaining which protected conduct is permitted and which is not. Precisely as with the electronic mail and messaging policy, in this policy the employer has “failed to define the area of permissible conduct in a manner clear to employees and thus caused employees to refrain from engaging in protected activities.” *American Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132, 137 (8th Cir. 1979). Employees confronting an employer’s rule “should not have to decide at their own peril what information is not lawfully subject to such a prohibition.” *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 12 (2011), cited in *DirectTV*, 359 NLRB No. 54, slip op. at 3 (2013). Such ambiguity and over breadth is unlawful precisely because it chills Section 7 activity—an employee will reasonably avoid all Section 7 activity precisely out of concern that the employer may apply the rule in a manner that impermissibly singles out Section 7 activity. This is the very essence of the problem that the Board precedent is designed to prevent.

The prohibition “on describing any affiliation with UPMC” is reasonably read to prohibit employees (who, are using Facebook Twitter, etc., which the employer’s rule permits) from telling anyone where they work, a restriction that severely inhibits discussion with others about the terms and conditions and pluses and minuses of their work experience. This unusual prohibition would greatly chill Section 7-related discussion, and perhaps nothing but Section 7-related discussion, without any apparent nondiscriminatory boundary or distinction in a rule that generally permits personal use of email to discuss matters on social media sites. As in *Costco*, supra, slip op. at 2 fn. 6: “Here, the rule at issue does not prohibit using the electronic communications system for all non-job purposes, but rather is reasonably understood to prohibit the expression of certain protected viewpoints. In doing so, the rule serves to inhibit certain kinds of Sec. 7 activity while permitting others and, for this reason, violates Sec. 8(a)(1).”

The rule prohibits the use of UPMC logos (and other trademarked or copyrighted materials) by employees when they are posting on social media sites. It is one thing to have a rule that is narrowly tailored to prohibit trademark or copyright infringement. But this sweeps much broader. Employees have a Section 7 right to display a logo as part of their Section 7 communications. There is no issue—or, more accurately, need not be an issue—of trademark or copyright infringement. See *Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019–1020 (1991), enf’d. 953 F.2d 638 (4th Cir. 1992) (employer policy prohibiting employees from wearing uniforms with company logo while

complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities. Accordingly, the rule is unlawful”); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348, 356–357 (2000) (rule prohibiting “false or misleading work-related statements concerning the company, the facility, or fellow associates” is unlawful), enf’d. 297 F.3d 468 (6th Cir. 2002); *Knauf BMW*, 358 NLRB No. 164, slip op. at 1 (2012) (“courtesy” rule prohibiting “disrespectful” conduct unlawful); *Cincinnati Suburban Press*, 289 NLRB 966 fn. 2, 975 (1988) (rule prohibiting false statements unlawful).

engaging in union activity is unlawful infringement of Section 7 rights of employees in absence of legitimate business justification). A rule that permits widespread use of social media by employees for nonwork purposes but bars use of logos is a prohibition of the expression of “certain protected viewpoints that inhibits certain kinds of Sec. 7 activity while permitting others and, for this reason, violates Section 8(a)(1).” *Costco*, supra.

Moreover, the acceptable use of information technology resources policy makes clear that all of the above limitations—on disparaging, misrepresenting, making false or misleading statements, or using UPMC logos—can be engaged in by employees if they receive prior written permission from UPMC to do so. This requirement that employees request and receive permission in order to find out if Section 7 activity will be permitted is antithetical to the Act. See *J. W. Marriott*, 359 NLRB No. 8 (2012), discussed above (managers’ absolute discretion over application of rule is unlawful because it requires management permission to engage in Section 7 activity and leads employees to reasonably conclude that they are required to disclose to management the nature of the activity for which they seek permission, a compelled disclosure that would certainly tend to chill the exercise of Section 7 rights).

Finally, the acceptable use of information technology resources policy requires employees using the internet to have “the written approval of UPMC’s Chief Information Officer or Privacy Officer” before transferring “[s]ensitive, confidential, and highly confidential information” over the internet. This will reasonably chill protected employee discussion such as on wages, personnel matters, benefits and other terms and conditions of employment,<sup>9</sup> and the conclusion is unavoidable here, as record evidence suggests that (in other employment rules) Respondents define “confidential information” to include “Compensation Data,” “Benefits Data,” “Staff Member (Co-Worker) Data,” and “Policies and Procedures.”<sup>10</sup> Thus, a rea-

<sup>9</sup> *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 3, 291–292 (1999) (rule prohibiting employees from revealing confidential information regarding customers, fellow employees, or hotel business, unlawful); *Albertson’s, Inc.*, 351 NLRB 254 (2007) (employer unlawfully used its confidentiality rule to discipline an employee for engaging in protected concerted activity, namely, providing employee names to assist the union’s organizing campaign).

<sup>10</sup> The December 13, 2012 consolidated complaint alleged that the Respondents maintained a “Confidential Information Policy” which provided as “examples of confidential information” “Compensation Data,” “Benefits Data,” “Staff Member (Co-Worker) Data,” and “Policies and Procedures.” Respondents’ answers neither admitted nor denied these allegations, stating instead that the “Confidential Information Policy is a document that speaks for itself” and then denying “all allegations . . . that are inconsistent with the document.” This nonanswer constitutes an admission under Board Rules. See Sec. 102.20. I note that documents, in fact, do not speak for themselves. *Lane v. Page*, 272 F.R.D. 581 602–603 (D. NM 2011); *State Farm Mutual Auto Insurance v. Riley*, 199 F.R.D. 276 (N.D. Ill. 2001) (app. p. 2). See also *Chicago District Council of Carpenters Pension Fund v. Balmoral Racing Club, Inc.*, 2000 U.S. Dist. LEXIS 11488, 2000 WL 876921 (N.D. Ill. 2000) (Judge Shadur) (“[Defendant] goes on in each of those paragraphs to state that it denies all of the corresponding Complaint allegations that are ‘inconsistent therewith.’ But how are [Plain-

sonable employee will conclude that the rule permits a wide-range of internet discussion, but excludes this particular and important type of Section 7 communication. This kind of viewpoint discrimination, based not on neutral drawing of lines but on the reasonable belief that core Section 7 topics have simply been excluded from discussion, is not permitted. *Costco*, supra. And as discussed, above, the problem is compounded by the rule's recitation that this "confidential" information may be transferred with the "approval" of a designated UPMC official. *J. W. Marriott*, supra.

For all of the above reasons, I find that the maintenance and promulgation of the acceptable use of information technology resources policy violates Section 8(a)(1) of the Act.<sup>11</sup>

tiffs'] counsel or this Court expected to divine just what provisions of the Complaint's allegations regarding the operative documents may be viewed as "inconsistent therewith" by [Defendant] and its counsel? . . . No reason appears why [Defendant] should not respond by admitting any allegation that accurately describes the content of whatever part of a document is referred to").

<sup>11</sup> Most of Respondents' brief (and much of the General Counsel's and the Union's briefs as well) is devoted to arguments regarding the propriety of *Register-Guard*. As noted, these arguments on which the Board must rule. I am bound to accept the *Register-Guard* precedent.

Respondents raise a few other defenses that warrant only brief mention. Respondents contend (R. Br. at 19–21) that allowing employees to use the email system for Sec. 7 purposes would constitute unlawful support by Respondents for union organizing. This argument turns precedent on its head. It suggests that permitting employee use of the email system for all purposes *except* Sec. 7 purposes would be acceptable, and indeed, that even when an employer permits free and unfettered use of email by employees it is *prohibited* from permitting email to be used for Sec. 7 purposes. Such an argument is without precedent and directly contrary to the Board's holding in *Register-Guard*. As long as employees can use email without regard to their views on unionization, there can be no serious claim that Respondents are susceptible to a claim of unlawful support for allowing Sec. 7 activity on their email system. Similarly, Respondents contention (R. Br. at 21–22) employee email usage to support unions would violate the right of employees to refrain from union activity is a straw man. No party suggests that prounion employees should be able to use the email system to voice their opinions while antiunion employees are prohibited from doing so. Such a policy would violate the Act under *Register-Guard* and under first principles of the Act. Respondents' contention that the hospital setting warrants unique restrictions on use of electronic communications for Sec. 7 purposes is misplaced. Under *Register-Guard*, Respondents are under no requirement to permit any nonwork employee use of email. But when they do, their discretion to bar Sec. 7 activity, or only Sec. 7 activity, is not unfettered. Respondents make no case why nonwork non-Sec. 7 activity is less distracting in a hospital setting than Sec. 7-related use of electronic communications.

Respondents also (R. Br. at 30) argue, citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), that the Board cannot decide this case because it lacks a quorum due to the allegedly unconstitutional recess appointment of two of the three current Board members. The Board rejected this argument in *Center for Social Change*, 358 NLRB No. 24 (2012), enf'd. D.C. Cir. 2012 U.S. App. LEXIS 25150 (2012). Moreover, it has rejected the argument in the wake of the decision in *Noel Canning*. See *Orni 8, LLC*, 359 NLRB No. 87, slip op. 1 at fn. 1 (2013).

Finally, Respondents assert in their answers that "the Board's Acting General Counsel was improperly and unlawfully appointed and cannot lawfully take any action in this matter." No support for this contention

#### UPMC's Motion for Judgment on the Pleadings and UPMC's Consent to be Bound for Purposes of Certain Remedial Relief

UPMC filed a document entitled "Motion for Judgment on the Pleadings," stamped received by the NLRB Order Section of the Board's Executive Secretary on February 20, 2013, at 12:19 p.m.

The motion seeks dismissal of UPMC "as a respondent in the case" on the grounds that the complaint "does not allege that UPMC engaged in any unfair labor practices" and that the Government "has failed to state a claim upon which relief can be granted."

Review of the complaint makes one thing clear: the complaint states no cause against UPMC. The complaint does not allege that UPMC engaged in any unfair labor practices. It does not seek a remedy against UPMC. Indeed, contrary to UPMC's representation in the motion, the complaint does not identify UPMC as a respondent. The previous iterations of the complaint *did* name UPMC as a respondent. (see, e.g., Amended Consolidated Complaint dated January 8, 2013; GC Exh. 1(y); Consolidated Complaint (GC Exh. 1(s)). With nothing more, UPMC's motion could be denied—as moot and unnecessary.

However, UPMC is not unconnected to the case. As referenced above, this case, along with several other cases originally comprised scores of alleged violations of the Act by Respondents, including UPMC, the parent entity that owns Respondent Presbyterian Shadyside and Respondent Magee. A settlement agreement between Respondents (at that time including UPMC) and the Union, approved by the Regional Director, resolved most of the outstanding allegations prior to issuance of the second amended complaint that was the subject of the hearing in this case.

The earlier complaints in this case all alleged that UPMC was a single employer with the subsidiary hospital respondents. UPMC denied the single-employer allegations (and denied the allegations of substantive misconduct). The pretrial settlement included a written stipulation, entered into evidence in the hearing in this case as Joint Exhibit 1, and represented without objection to be "a resolution of the . . . single employer issue."

This document stipulated that "[t]he Respondent"—which included UPMC—would expunge any policies found to be unlawful "wherever they exist on a systemwide basis at any and all of Respondent's facilities" and that the Respondent will "notify all of its employees at all of Respondent's facilities within the United States and its territories where such policies were in existence . . . that such policies have been rescinded and will no longer be enforced."

is provided. Acting General Counsel Lafe Solomon was appointed to his office on June 21, 2010, pursuant to Sec. 3(d) of the Act, which provides: "In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy . . ." Notably, Respondents do not argue that the Acting General Counsel's lawful appointment lapsed, but only that his appointment was improper and unlawful. I reject the contention for which Respondents provide no support.

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While the extant second amended complaint maintains no allegations of wrongdoing against UPMC, nevertheless UPMC was served with the second amended complaint, filed objections and an answer to the second amended complaint, and UPMC's counsel who filed the answer and objection appeared at the hearing (they also represent the subsidiary respondents). The stipulation was entered into evidence without objection in their presence. Moreover, Respondents' posthearing brief was filed on behalf of UPMC, as well as Presbyterian Shadyside and Magee. (R. Br. at 1.) Thus, UPMC has been fully apprised of and involved in this case, despite the lack of substantive claims against it in the second amended complaint. There is no due process problem (and none alleged) with holding UPMC liable for remedial purposes to the extent UPMC consented to be bound by a remedial order, as set forth in Joint Exhibit 1.

The upshot of all of this is—that while I agree with UPMC that no cause of action is stated against it in the complaint, UPMC has agreed to be bound for certain stipulated remedial purposes, and was and is a party for purposes of remedial relief, akin to a rule 19 defendant in Federal court. This serves not only to empower the Board to issue remedial relief affecting UPMC, but permits UPMC to protect its interests. I deny the motion for judgment on the pleadings on these grounds.<sup>12</sup>

#### CONCLUSIONS OF LAW

1. Respondent UPMC Presbyterian Shadyside and Respondent Magee-Womens Hospital of UPMC are employers within the meaning of Section 2(2), (6), and (7) of the Act, and health care institutions within the meaning of Section 2(14) of the Act.

2. Since about February 1, 2012, Respondents have violated Section 8(a)(1) of the Act by their maintenance of the electronic mail and messaging policy and the acceptable use of information technology resources policy.

3. The unfair labor practices committed by Respondents affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

Respondents shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

Within 14 days, Respondents shall rescind the personnel and human resources policy entitled "Electronic Mail and Messaging Policy," and the policy entitled "Acceptable Use of Information Technology Resources Policy," maintained on the UPMC Infonet.

As part of the remedy in this case, Respondents shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in all Respondents' facilities or wherever the notices to employees are regularly posted

ed for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondents customarily communicate with their employees by such means. In the event that, during the pendency of these proceedings, Respondents have gone out of business or closed a facility involved in these proceedings, Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by Respondents at any time since February 1, 2012. When the notice is issued to Respondents, they shall sign it or otherwise notify Region 6 of the Board what action they will take with respect to this decision.

In Joint Exhibit 1, Respondents, and UPMC stipulated to the following:

The undersigned parties hereby stipulate that any policies either adjudicated as unlawful, or which Respondent agrees to voluntarily rescind in connection with the instant matter, will be expunged wherever they exist on a systemwide basis at any and all of Respondent's facilities within the United States and its territories, including, but not limited to, those which are operated by UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC.

Moreover, Respondent agrees that it will notify all of its employees at all of Respondent's facilities within the United States and its territories where such policies were in existence, including, but not limited to, those employees working in facilities which are operated by UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC, that such policies have been rescinded and will no longer be enforced. Appropriate notice to employees of the rescission will be accomplished by whatever means Respondent has traditionally used to announce similar policy changes to employees in other circumstances.

Presbyterian Shadyside, Magee, and UPMC shall comply with the terms of this stipulation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>13</sup>

#### ORDER

Respondents UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC, Pittsburgh, Pennsylvania, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining a personnel and human resources policy such as that entitled the "Electronic Mail and Messaging Policy," including on the UPMC Infonet, that contains the following language:

UPMC electronic messaging systems may not be used:

<sup>12</sup> The General Counsel and the Union argue (GC Br. at 29–30; CP Br. at 29) that the motion was untimely. The General Counsel also argues that the motion was not properly served (GC Br. at 30). I do not reach those arguments in light of my denial of the motion.

<sup>13</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- To promote illegal activity or used in a way that may be disruptive, offensive to others, or harmful to morale; or
- To solicit employees to support any group or organization, unless sanctioned by UPMC executive management;
- In a manner inconsistent with UPMC policies and directives, including, but not limited to policies concerning commercial communication, solicitation, sexual harassment, job performance and appropriate Internet use.

(b) Promulgating and maintaining a personnel and human resources policy such as that entitled the "Acceptable Use of Information Technology Resources Policy," including on the UPMC Infonet, that contains the following language:

UPMC workforce members shall only use UPMC information technology resources for authorized activities. Authorized activities are related to assigned job responsibilities and approved by the appropriate UPMC management. To the extent that a UPMC information technology resource is assigned to an employee, the employee is permitted de minimis personal use of the UPMC information technology resource.

"De minimis personal use" is defined as use of the information technology resource only to the extent that such use does not affect the employee's job performance nor prevents other employees from performing their job duties.

....

20. Without UPMC's prior written consent, a UPMC workforce member shall not independently establish (or otherwise participate in) websites, social networks (such as face book, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:

- Describe any affiliation with UPMC;

....

- Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;

....

- Use UPMC's logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titles "Use of UPMC Name, Logo, and Tagline").

....

23. Sensitive, confidential, and highly confidential information transferred over the Internet shall use appropriate security controls and have the written approval of UPMC's Chief Information Officer or Privacy Officer.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days, rescind the personnel and human resources policy entitled "Electronic Mail and Messaging Policy," maintained on the UPMC Infonet that contains the following language:

UPMC electronic messaging systems may not be used:

- To promote illegal activity or used in a way that may be disruptive, offensive to others, or harmful to morale; or
- To solicit employees to support any group or organization, unless sanctioned by UPMC executive management;
- In a manner inconsistent with UPMC policies and directives, including, but not limited to policies concerning commercial communication, solicitation, sexual harassment, job performance and appropriate Internet use.

(b) Within 14 days, rescind the personnel and human resources policy entitled "Acceptable Use of Information Technology Resources Policy," maintained on the UPMC Infonet that contains the following language:

UPMC workforce members shall only use UPMC information technology resources for authorized activities. Authorized activities are related to assigned job responsibilities and approved by the appropriate UPMC management. To the extent that a UPMC information technology resource is assigned to an employee, the employee is permitted de minimis personal use of the UPMC information technology resource.

"De minimis personal use" is defined as use of the information technology resource only to the extent that such use does not affect the employee's job performance nor prevents other employees from performing their job duties.

....

20. Without UPMC's prior written consent, a UPMC workforce member shall not independently establish (or otherwise participate in) websites, social networks (such as face book, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:

- Describe any affiliation with UPMC;

....

- Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;

....

- Use UPMC's logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titles "Use of UPMC Name, Logo, and Tagline").

....

23. Sensitive, confidential, and highly confidential information transferred over the Internet shall use appropriate se-

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curity controls and have the written approval of UPMC's Chief Information Officer or Privacy Officer.

(c) Within 14 days after service by the Region, post at all their facilities nationwide the attached notice marked "Appendix."<sup>14</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by Respondents' authorized representative, shall be posted by Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondents have gone out of business or closed any facility involved in these proceedings, Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by Respondents at any time since February 1, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondents have taken to comply.

As further remedy for the violations found in this case, UPMC, Respondents UPMC Presbyterian Shadyside, and Magee-Womens Hospital of UPMC, Pittsburgh, Pennsylvania, their officers, agents, successors, and assigns, shall, in accordance with the stipulation (Joint Exhibit 1) signed by all parties:

1. Take the following affirmative action which has been agreed to pursuant to the stipulation signed by the parties, and is necessary to effectuate the purposes of the Act:
  - a. Expunge the Electronic Mail and Messaging Policy and the Acceptable Use of Information Technology Resources Policy wherever they exist on a systemwide basis at any and all of UPMC, Presbyterian Shadyside, and Magee's facilities within the United States and its territories.
  - b. Notify all of their employees at all of their facilities within the United States and its territories where the Electronic Mail and Messaging Policy and the Acceptable Use of Information Technology Resources Policy were in existence, that such policies have been rescinded and will no longer be enforced. Appropriate notice to employees of the rescission will be accomplished by whatever means UPMC, Presbyterian Shadyside, and Magee have tradition-

ally used to announce similar policy changes to employees in other circumstances.

Dated, Washington, D.C. April 19, 2013.

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT promulgate and maintain a personnel and human resources policy such as that entitled the "Electronic Mail and Messaging Policy," including on the UPMC Infonet, that contains the following language:

UPMC electronic messaging systems may not be used:

- To promote illegal activity or used in a way that may be disruptive, offensive to others, or harmful to morale; or
- To solicit employees to support any group or organization, unless sanctioned by UPMC executive management;
- In a manner inconsistent with UPMC policies and directives, including, but not limited to policies concerning commercial communication, solicitation, sexual harassment, job performance and appropriate Internet use.

WE WILL NOT promulgate and maintain a personnel and human resources policy such as that entitled the "Acceptable Use of Information Technology Resources Policy," including on the UPMC Infonet that contains the following language:

UPMC workforce members shall only use UPMC information technology resources for authorized activities. Authorized activities are related to assigned job responsibilities and approved by the appropriate UPMC management. To the extent that a UPMC information technology resource is assigned to an employee, the employee is permitted de minimis personal use of the UPMC information technology resource.

"De minimis personal use" is defined as use of the information technology resource only to the extent that such use does not affect the employee's job performance nor prevents other employees from performing their job duties.

....

<sup>14</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

20. Without UPMC's prior written consent, a UPMC workforce member shall not independently establish (or otherwise participate in) websites, social networks (such as face book, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:

- Describe any affiliation with UPMC;

....

- Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;

....

- Use UPMC's logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titles "Use of UPMC Name, Logo, and Tagline").

....

23. Sensitive, confidential, and highly confidential information transferred over the Internet shall use appropriate security controls and have the written approval of UPMC's Chief Information Officer or Privacy Officer.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days rescind the rescind the personnel and human resources policy entitled "Electronic Mail and Messaging Policy" maintained on the UPMC Infonet that contains the language set forth above.

WE WILL within 14 days rescind the rescind the personnel and human resources policy entitled "Acceptable Use of Information Technology Resources Policy," maintained on the UPMC Infonet that contains the language set forth above.

WE WILL, along with UPMC, expunge the Electronic Mail and Messaging Policy and the Acceptable Use of Information Technology Resources Policy wherever they exist on a systemwide basis at any and all of UPMC, Presbyterian Shadyside, and Magee's facilities within the United States and its territories.

WE WILL, along with UPMC, notify all employees at all of our facilities within the United States and its territories where the Electronic Mail and Messaging Policy and the Acceptable Use of Information Technology Resources Policy were in existence, that such policies have been rescinded and will no longer be enforced.

UPMC PRESBYTERIAN SHADYSIDE AND MAGEE-  
WOMENS HOSPITAL OF UPMC